No. 82-15

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RAY E. OLIVER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Has this Court's decision in *United States* v. *Katz*, 389 U. S. 347 (1967) modified the holding of *Hester* v. *United States*, 265 U. S. 57 (1924) to the extent of requiring a search warrant for the search of a highly secluded field when a reasonable expectation of privacy can be shown to exist in that field?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on May 5, 1982.

OPINION BELOW

The opinion of the Court of Appeals decided and filed on May 5, 1982, (Appendix D), has not yet been reported. A petition for rehearing was not filed.

JURISDICTION

The opinion of the Court of Appeals (Appendix D) was decided and filed on May 5, 1982. A petition for rehearing was not filed in this case. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no one shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Statutory Provisions:

21 U.S.C.S. §841(a), provides as follows:

> Except as authorized by this title it shall be unlawful for any person knowingly or intentionally
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or
> (2) to create, distribute or dispense or possess with intent to distribute or dispense, a counterfeit substance.

18 U.S.C. §2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another

would be an offense against the United States, is punishable as a principle.

STATEMENT OF THE CASE

Petitioner is a 62 year-old retired farmer who was charged with manufacturing marijuana in violation of 21 U.S.C.S. §841(a)(1) and 18 U.S.C.S. §2. The United States District Court for the Eastern District of Kentucky held an evidentiary hearing on November 13, 1980, and ordered that the search of the Petitioner's property was in violation of the Petitioner's Fourth Amendment rights and, therefore, ordered that all evidence obtained as a result of that search must be suppressed. [Appendix A, p. 20.]

The Respondent filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on November 20, 1980. A panel of the Sixth Circuit, in an opinion rendered on August 7, 1981, affirmed the District Court's holding that the owner of an open field is entitled to Fourth Amendment protection if he has a reasonable expectation of privacy in his property. [Appendix C, pp. 28, 29.]

The Respondent filed a timely petition for rehearing en banc which was granted and the Sixth Circuit withdrew its original opinion and, in an opinion rendered on May 5, 1982, reversed its previous finding and held that the "Open Fields Doctrine" first announced in *Hester* v. *United States*, 265 U. S. 57 (1924), is valid as applied to the facts of this case. [Appendix D, pp. 37, 38.]

The facts adduced at the suppression hearing demonstrate that the Petitioner is a 62 year-old retired farmer. On the date of the search, the Petitioner was employed by the Kentucky Department of Highways as a laborer and lived on his farm with his wife and daughter.

On or about July 18, 1980, Detective Ben Hadley and Detective Jimmy Antle received a tip from an anonymous informer to the effect that marijuana could be found growing on the Petitioner's farm. The detectives proceeded directly to the Petitioner's farm without making any attempt whatsoever to procure a warrant for the search of the Petitioner's farm.

The agents approached the Petitioner's farm on a state highway and then turned onto Rock House Bottom Road and proceeded on to the Petitioner's land which was posted with a number of "No Trespassing" signs. The agents ignored the "No Trespassing" signs and proceeded several hundred yards to the Petitioner's residence. The agents had no warrant and made no attempt to procure the Petitioner's consent to enter the premises which were clearly posted with "No Trespassing" signs at four different intervals.

The agents had proceeded approximately three-quarters of a mile beyond the Petitioner's house when they encountered a gate that blocked the road. This gate was locked with a chain and padlock and was again posted with a "No Trespassing" sign.

Unable to proceed further by automobile, the officers continued on foot through a hole in the locked

gate to a barn which was located about three-fourths of a mile beyond the house. At this point, someone appeared near the barn and called to the agents to come back, explaining that hunting was not allowed. The officers ignored this request to leave and proceeded on approximately one-fourth mile further through fields and wooded areas until they entered a secluded field and found marijuana.

It is important to note that it is undisputed that the field where the marijuana was found is *completely secluded*. The Respondent has stipulated that this field is not visible from the Cumberland River which borders a major portion of the Petitioner's land, nor from the posted and locked gate which was ignored by the agents, nor from the Petitioner's house. In other words, the marijuana could not be seen by anyone standing on land other than that owned by the Petitioner, and then only after the officers had ignored four "No Trespassing" signs, a locked gate, verbal warnings to not trespass, and had traveled about one mile onto Petitioner's property.

The agents then left the Petitioner's farm and met him on the highway returning home from work and placed him under arrest for cultivating marijuana.

REASON FOR GRANTING THE WRIT

It Is a Fundamental Violation of the Fourth Amendment of the United States Constitution for Police Officers to Enter Onto Private Farm Property Where the Public Has Been Excluded by Means of Posted No Trespassing Signs and Locked Gates and Conduct a Search of That Property Without a Warrant or the Owner's Consent.

This Court has strictly construed any proposed abbrogations of the privacy interest protected by the Fourth Amendment. "[S]earches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States,* 389 U. S. 347, 357, 19 L. Ed. 576, 88 S. Ct. 507 (1967). The government bears the burden of establishing that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *See Camara* v. *Municipal Court of the City & County of San Francisco,* 387 U. S. 523, 528-529, 18 L. Ed. 930, 87 S. Ct. 1727 (1967); *Payton* v. *New York,* 445 U. S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980).

The Respondent contends that the warrantless search of Petitioner's property was made under one of the exceptions to the warrant requirement, the Open Fields Doctrine. It is Petitioner's position that the Respondent's reliance upon the Open Fields Doctrine in this case is misplaced.

This Court's decision in *McDonald* v. *United States,* 335 U. S. 451, 93 L. Ed. 158 (1948) established that

evidence obtained by a search and seizure made without a search warrant should be suppressed when no compelling reasons justify the non-procurement of a search warrant. The Court reasoned that the right of privacy was too precious to entrust to the discretion of police officers and that in order to justify a warrantless search, police officers must show some type of exigent circumstances. *Id.*, at 455. The record in the instant case demonstrates that there were no compelling reasons or exigent circumstances to justify the non-procurement of a search warrant. Forced to admit this (App. D note 4, p. 40), the Respondent's entire claim must stem rather tenuously from the Open Fields Doctrine.

In its first decision rendered on August 7, 1981, the Sixth Circuit affirmed the lower court's decision suppressing the evidence and held that:

> We note that our decision in *United States* v. *Hassell,* 336 F. 2d 684 (6th Cir. 1964), which held that "open fields" were automatically exempted from the warrant requirement, is inconsistent with the Supreme Court's decision in *Katz.* It is therefore no longer the law of this circuit. *United States* v. *Oliver,* 657 F. 2d 85 (1981). [App. C, p. 30.]

In its second opinion, delivered May 5, 1982, the Sixth Circuit, en banc, withdrew its original opinion and accepted the Respondent's theory that the warrantless search of the Petitioner's property was within the Open Fields exception, and held that no privacy rights existed in the highly secluded fields located on

the Oliver property and that the Fourth Amendment did not protect those fields even though they were fenced with locked gates and posted with "No Trespassing" signs, and were a mile away from the entrance to the farm. [Appendix D, pp. 37, 38.] In reversing the District Court, the Court maintained that the Open Fields Doctrine first enunciated in the 1920's in *Hester* v. *United States*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), was not affected in any way by this Court's ruling in *Katz*. [Appendix D, p. 37.]

Petitioner submits that this "per se" approach to search and seizure problems negates the fundamental rights guaranteed by the Fourth Amendment in favor of the singular, distinguishable Open Fields Doctrine, and overlooks the essence of the Doctrine itself, ignoring the sound principle set forth in *Katz* that the Fourth Amendment protects people and not places. In retaining an inflexible and unrealistic view of the Open Fields Doctrine, the Court below has avoided a proper and complete understanding and integration of the law of *Katz* into modern Fourth Amendment analysis.

The Open Fields Doctrine relied upon by the Petitioner is the result of a peculiar combination of *Hester's* "open field" term, and *Olmstead's* holding that the Fourth Amendment provides protection only against an actual physical invasion of the home or curtilage for the purpose of making a seizure.

In a well-reasoned dissent to the May 5, 1982, en banc opinion, Circuit Judge Keith noted that the notion that *Katz* did not modify the Open Fields Doctrine is the result of a failure to distinguish between *Hester*

and the case that actually represents the origin of the doctrine, *Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928). [Appendix D, p. 43.] The Sixth Circuit's reliance on the holdings in those cases resulted in an unrealistic "locational" approach; vis., that an open field area beyond the curtilage is *never* to be entitled to Fourth Amendment protection. See also, *United States* v. *Hassell*, 336 F. 2d 684, 685 (6th Cir. 1964). In *United States* v. *Dunn*, —— F. 2d ——, 31 Cr. L. Rept. 2214 (1982), a most recent case in the United States Court of Appeals for the Fifth Circuit, the court, while finding that an area searched was within the curtilage of the residence and was therefore "within the protective ambit of the Fourth Amendment", utilized *Katz* Fourth Amendment analysis identical to that asserted by Petitioner herein, and rejected by the Sixth Circuit in the case at bar, vis., that the area is protected by the Fourth Amendment if the person has exhibited an actual (subjective) expectation of privacy, if that expectation is reasonable.

In *Katz* this Court recognized the unreasonableness of the "locational" approach adopted by the Sixth Circuit. In *Katz* the defendant alleged that the bugging and taping of telephone conversations made from a public booth constituted an invasion of his Fourth Amendment right to privacy. This Court rejected the government's assertion of the per se "locational" theory and perceptively concluded that a discussion on that level "deflects attention from the problem" of the scope of Fourth Amendment protec-

tion. *Katz,* at 350-353. Directly attacking the continued relevance of the *Olmstead* case, the Court noted that "we have since departed from the narrow view on which the decision rested." *Id.*, at 352-353. It is difficult to conceive of what more this Court could have said to indicate that the Open Fields Doctrine has been modified by *Katz.* The Court below has opted to ignore the holding of *Katz* and this Court's departure from *Olmstead.* The Court below has asserted, quite to the contrary, that *Katz* does not modify the *Olmstead/Hester* doctrine.

The Sixth Circuit's total reliance on the *Olmstead/Hester* doctrine is misplaced and flies in the face of the *Katz* decision and its progeny. The courts of the United States have clearly recognized *Katz* as the standard by which Fourth Amendment cases are hereafter to be judged. Fourth Amendment protection is determined by a two-part test:

> First, that a person have exhibited an actual "subjective" expectation of privacy, and, second, that the expectation is one that society is prepared to recognize as reasonable. *Katz,* at 361.

In *United States* v. *Taborda,* 635 F. 2d 131 (2nd Cir. 1980), the court explained the *Katz* test, concluding that:

> We take the first factor to mean in essence that the defendant must have acted in such a way that it would have been reasonable for him to expect that he would not be observed;

and the second factor:

> Requires that the action occur in a place in which society is prepared, because of its code of values and its notion of custom and civility, to give deference to a manifested expectation of privacy. *Id.* at 137.

It cannot be disputed that the actions of the Petitioner in locking the gate, posting the property with No Trespassing signs, and living with his family on the land in question satisfied the elements described above. Surely society's "code of values" and "notion of custom and civility" have not been so eroded as to permit the State to ignore the manifest expressions of a property owner's desire for privacy on his own land.

The narrow holding in *Hester,* that federal agents could trespass on to an area *from which the public was not excluded* and view that which was exposed to public view without violating the Fourth Amendment, remained intact after the *Katz* ruling. At the same time, *Olmstead's* "constitutionally protected area" rationale was overruled. See *Rakas* v. *Illinois,* 439 U. S. 128, 143, 58 L. Ed. 387, 99 S. Ct. 421, (1978).

In light of this Court's decisions in *Katz, Rakas,* and *Rawlings* v. *Kentucky,* 448 U. S. 98, 65 L. Ed. 2d 633, 100 S. Ct. 2556 (1980), Petitioner suggests that the modern test should be stated thusly: ***warrantless searches for objects (1) not exposed to the public, and (2) located in areas where the public is excluded, are***

subject to the reasonable expectation of privacy test of Katz.

This Court has accepted this test as dispositive of Fourth Amendment problems similar to the case at bar. In *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974), this Court held that a federal agent could trespass onto an area where the public was *not* excluded and view that which was exposed to the public without violating the Fourth Amendment. The Court relied on the fact that *the public was not excluded* and that therefore the area in question could be labeled an "open field" for purposes of the analysis. *Id.,* at 865.

Marshall v. *Barlow's, Inc.,* 436 U. S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) refined this analysis, the Court concluding that, without a warrant, a government agent is *in no better position than a member of the public,* and, conversely, observations capable of being made by the public can be made by the government agents without a warrant. *Id.,* at 315. [Emphasis added.] This analysis defines the essential issue, and accurately describes the modern application of the Open Fields Doctrine, i.e., that the doctrine is still legitimate, but only when applied to areas that are outside the curtilage and open to or capable of being viewed by the public.

Although "open field" has never been clearly defined by this Court, the effect of *Katz* was to give the rule a realistic and useful meaning. In deference to this meaning, courts have held that the open fields exception is not applicable where the warrantless

search was conducted in an area from which the public was excluded. In *United States* v. *FMC Corporation*, 428 F. Supp. 615 (W.D. N.Y. 1977) aff'd, 572 F. 2d 902 (2nd Cir. 1978), the Court found that a highly restricted access to the area in question prevented the application of the Doctrine.

The threshold question in this case is this: Did the Petitioner exhibit his intention to exclude the warrantless Kentucky State Troopers from his land? The answer is "Yes". This question should be addressed when applying the "reasonable expectation of privacy" test of *Katz*. This Court's reasoning in *Western Alfalfa, supra*, that whether or not the public has been excluded from the area or view in question must be the first consideration for the court, was echoed by the Tenth Circuit Court of Appeals in *Patterson* v. *National Transportation Safety Board*, 638 F. 2d 144 (10th Cir. 1980). That court held, while citing *Western Alfalfa and Hester*, that, because the public was not excluded from viewing what the government agent had viewed, that search was valid. *Patterson, supra*, at 146.

Even prior to the *Western Alfalfa* decision, the Ninth Circuit in *United States* v. *Pruitt*, 464 F. 2d 494 (9th Cir. 1972) based its Fourth Amendment analysis on the question of whether or not, according to *Katz*, the Petitioner had exhibited a justified expectation of privacy by excluding the public from the area in dispute. The court noted that the area had *not* been excluded from public view because:

> . . . any casual passerby would feel perfectly free to ascertain what it was he had found. *Id.* at 496.

The defendant in *Pruitt,* therefore, had not satisfied the elements necessary for the court to find a reasonable expectation of privacy in light of *Katz.* In the instant case, it is clear that no "casual passerby" would have ignored vocal warnings to leave the property, "No Trespassing" signs, a locked gate, and a mile of densely wooded forest to view the secluded fields of the Petitioner. The *Katz* standard is the law, and Petitioner's actions in preserving his reasonable expectation of privacy entitle him to the protection of that law.

The Sixth Circuit, however, chose to avoid this aspect of the case, and, overlooked the analysis most essential to the resolution of this case.

Petitioner does not challenge the validity of the modified Open Fields Doctrine when the land in question is in fact "open" to the public or is exposed to plain view. However, as here, when an area is neither exposed to nor open to the public, it is not an open field, but, rather, an area in which the owner maintains a reasonable expectation of privacy.

In this case, the District Court found, and properly so, that the area trespassed upon and searched by the state troopers was not an open field since it was totally secluded from the public by means of "No Trespassing" signs, a locked gate, and nearly a mile of wooded forest. [Appendix B, p. 22.] In addition, and as

irrebuttal evidence of Petitioner's express manifestation of a "reasonable expectation of privacy", the troopers were *told to leave the property.* The field in question could not be seen from any point of public access. Simply stated, Petitioner possessed and exhibited a subjective expectation of privacy in his farm land.

A plain reading of the facts of this case demonstrates that this expectation is one to which society is prepared to defer in recognition of the rights protected by the Fourth Amendment. Petitioner owned this land, had a home on it, and lived on the land with his wife and daughter. Nothing prevented the government agents from obtaining a search warrant. Yet, the Sixth Circuit noted:

> In weighing the privacy interest of the owner of open fields against the public interest in law enforcement's making *random* investigations to detect the production of drugs and moonshine, the public interest should prevail. [Emphasis added.] [Appendix D at 38.]

Not only did the Court assume, quite incorrectly, that the field in question was "open", but has also chosen to ignore the constitutionally-mandated nexus between probable cause and the Fourth Amendment. This omission belies the mistaken position adopted by that Court in reversing the District Court's order suppressing the evidence.

CONCLUSION

On May 24, 1982, this Court granted certiorari in the case of *State of Florida* v. *Brady*, 406 So. 2d 1093, (Fla. Sup. Ct. 1981), No. 81-1636, on the identical question presented in this Petition. The facts of this case, however, present a much clearer issue for review. While *Brady* involved a review of a state court decision, this case arises from a decision in the federal courts and involves an ongoing discussion of the federal case law on the issue.

The Sixth Circuit Court of Appeals, in reversing its decision suppressing the evidence obtained by the warrantless search of Petitioner's farm property, violated Petitioner's right to be protected against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution. In light of this Court's decision in *Katz* v. *United States*, that the Fourth Amendment protects people and not places, the Open Fields Doctrine relied upon by the Sixth Circuit should not be applied to this case, as Petitioner possessed and plainly exhibited a reasonable expectation of privacy in the secluded land searched by the state troopers.

For the reasons hereinabove stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CR-80-00005-01-BG

UNITED STATES OF AMERICA, - - - - - *Plaintiff*,

v.

EDWARD RAY OLIVER, - - - - - - *Defendant.*

ORDER

This case was called in open court on November 13, 1980 for trial by jury. There appeared Assistant United States Attorney Scott Wendelsdorf and the defendant, Edward Ray Oliver, in person and with his employed counsel, The Honorable Robert L. Wilson.

A jury was empaneled and sworn. Prior to calling any witness, a Suppression Hearing was had out of the presence of the jury. At the hearing the Court, having considered the defendant's motion to suppress evidence of marijuana, found during a warrantless search of the defendant's farm, the testimony presented and the arguments of counsel, sustained the motion based upon findings and grounds which would be more fully set out in a written opinion which would follow.

Thereupon, the United States moved that the jury be discharged and that it be permitted to appeal the Court's ruling to the United States Court of Appeals for the Sixth Circuit prior to the trial of the defendant; certifying to the Court that the motion to appeal was not taken for the

purpose of delay and that the evidence suppressed is a substantial proof of the charge pending against the defendant. The Court so finding, the jury was discharged.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. The motion to suppress evidence of marijuana found during a warrantless search of the defendant's farm is SUSTAINED.

2. The appeal to the United States Court of Appeals for the Sixth Circuit may be taken by the United States from this order granting the motion to suppress evidence, made before the trial of the defendant charged with a violation of a law of the United States.

3. The Jury Trial is continued pending the filing of the mandate or the filing of the entry dismissing the appeal with the Clerk of this Court.

4. The delay resulting from this interlocutory appeal shall be deemed excludable, under the provisions of the Speedy Trial Act, Title 18, U.S.C. §3161(h)(1)(E), in computing the time within which this case must be tried.

5. The defendant shall remain on his same bond.

DATED: November 14, 1980

(s) Edward H. Johnstone
Judge, United States District Court

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CR-80-00005-BG

UNITED STATES OF AMERICA, - - - - - *Plaintiff*,

v.

EDWARD RAY OLIVER, - - - - - - *Defendant.*

MEMORANDUM OPINION—Entered November 19, 1980

This case is before the Court pursuant to the Order dated November 14, 1980 in which the Court sustained defendant's motion to suppress evidence of marijuana found during a warrantless search of his farm. This opinion sets forth the Court's findings of fact and legal conclusions regarding that motion.

On July 18, 1980, a narcotics agent and a detective (both employed by the Kentucky State Police), acting on information from an unknown source (Tr. 3), went to defendant's farm and conducted a warrantless search. They discovered marijuana growing in a secluded part of his farm. They then left the farm, met defendant on a public road and returned with him to the farm, where they supervised the destruction of the marijuana.

The Supreme Court of the United States held, in *Katz* v. *United States*:

> It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is *per se* unreason-

> able . . . subject only to a few specifically established and well delineated exceptions.

389 U. S. 347, 357 (1967).

Thus, the burden of proof is on the government to show why this search, conducted without a warrant (Tr. 16, 21), is not violative of these constitutional protections. *Beck* v. *Ohio*, 379 U. S. 89, 97 (1964); *Schnepp* v. *Hocker*, 429 F. 2d 1096 (9th Cir. 1970).

The government relies on a line of cases, beginning with *Hester* v. *United States*, 265 U. S. 57 (1924), which holds that "open fields" do not come within the ambit of Fourth Amendment protection. Defendant argues that the "open fields" doctrine is no longer viable as a blanket exception to the warrant requirement in view of the holding in *Katz*, *supra*, that the controlling question must be whether a reasonable expectation of privacy existed in the area searched. The government contends that, even after *Katz*, this search was valid because no reasonable expectation of privacy exists in a field such as the one searched (Tr. 60-61).

In view of the factual situation here, this Court finds a reasonable expectation of privacy to be present. The defendant's property was posted "no trespassing" at regular intervals (Tr. 34, 55), and the officers saw the signs and knew they were trespassing on defendant's property (Tr. 20, 30-31, 62). They circumvented a locked gate to gain entrance to the interior part of the farm (Tr. 4, 21, 29). The fields in question are highly secluded: they are bounded on all sides by woods, fences, and embankments. They cannot be seen from the nearest point of public access. (Tr. 35, 55, Exhibit 1). The officers did not see any marijuana until they went around the locked gate posted with a no trespassing sign, and then walked several hundred yards (Tr. 4-6, 29, Exhibit 1). They first observed

the marijuana only when they finally reached the field itself (Tr. 21-22). Short of posting guards at the entrance, it is difficult to see what else the defendant could have done to assert his privacy interest in this property. Clearly it was reasonable for him to believe that government agents could not ignore the barriers he erected and trespass upon and search his property without a warrant issued upon probable cause.

Defendant has pointed to a number of very persuasive state court decisions involving factual situations that are almost identical. *See, e.g. Tennessee* v. *Larkin*, 588 S. W. 2d 544 (Tenn. 1979); *Hawaii* v. *Kender*, 588 P. 2d 447 (Ha. 1979); *Burkholder* v. *Superior Court*, 96 Cal. App. 3d 421 (Cal. 1979); *Florida* v. *Brady*, 379 So. 2d 1294 (Fla. App. 1980); *Tennessee* v. *Wert*, 500 S. W. 2d 1 (Tenn. App. 1977).

The cases cited by the government involve situations where the violations of the defendants' reasonable privacy expectations were not merely so egregious as the one at bar. And even in *United States* v. *Williams*, 581 F. 2d 451, 453 (5th Cir. 1978), where government agents followed the scent of moonshine whiskey to a shed at the corner of the defendant's property, the Fifth Circuit noted that the agent's actions pushed the outer limits of propriety. *Id.* at 454. It should also be noted that in *Williams* [as in *U. S.* v. *Basile*, 569 F. 2d 1053 (9th Cir. 1978)] the evidence was easily transportable and could have been removed very quickly, unlike the fields here. Here there is absolutely no showing of any exigent circumstances requiring immediate action before a warrant could be procured. Moreover, in *Williams*, the agent did procure a search warrant *after* his investigation led him to the contraband on defendant's property, but before any evidence was seized.

Although the evidence in question is from a field, the field was not an "open" one. The defendant had done all

that could be expected of him to assert his privacy in the area of farm that was searched. This Court must agree with the dissenting opinion in *Commonwealth* v. *Janek*, 363 A. 2d 1299 (Pa. 1976). There, in a situation almost factually identical with this one, Judge Hoffman wrote:

> I believe that the instant case represents another exception to the "open field" doctrine. . . . The field in which he [appellee] planted marijuana was surrounded by embankments and barbed wire fences. The land was posted to give notice to all who would trespass that the owner intended to protect his privacy. That is, although we are dealing with a field, it was not an open one, inviting casual intrusion. *Id.*

See: LaFave, *Search and Seizure*: *A Treatise on the Fourth Amendment*, §2.4(a), pp. 336-337 (1978).

The Court therefore finds that defendant had a reasonable expectation of privacy, that no exceptions to the warrant requirement of the Fourth Amendment apply, and accordingly, the evidence must be suppressed.

DATED: November 18, 1980

(s) Edward H. Johnstone
Judge, United States District Court

Copies to:

U. S. Attorney
Mr. Wilson

APPENDIX C

No. 80-5437

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

RAY E. OLIVER, a/k/a EDWARD RAY OLIVER, - - - - - *Defendant-Appellee*

Argued April 15, 1981.
Decided Aug. 7, 1981.

Alexander Taft, U. S. Atty., Scott Wendelsdorf, Asst. U. S. Atty., Louisville, Ky., for plaintiff-appellant.

Robert L. Wilson, Jamestown, Ky., for defendant-appellee.

Before LIVELY and KEITH, Circuit Judges, and RICE,* District Judge.

KEITH, Circuit Judge.

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*Hon. Walter H. Rice, U. S. District Judge for the Southern District of Ohio, sitting by designation.

Appellant Edward Ray Oliver was indicted and charged with manufacturing marijuana in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2. At a pre-trial suppression hearing, the district court sustained a motion by Oliver to exclude evidence obtained from the warrantless search of his property. The evidence the government had sought to admit was marijuana crops which were discovered growing in a field on the property. On this appeal, the United States argues that a warrantless search of open farm land is not a violation of the Fourth Amendment search and seizure provision and, therefore, that the district court's refusal to admit evidence of the marijuana found growing on Oliver's property must be reversed.

The record below establishes that Oliver, a retired farmer, lives with his family on the property in question. He uses the bulk of the acreage to raise hogs and for other domestic purposes. The remaining crop land is leased for commercial farming use. On July 18, 1980, a tip from an informant, who remains unidentified, was received by phone at the Columbia post of the Kentucky State Police. The anonymous caller stated that marijuana was growing on the Oliver farm. Detectives Ben Hadley and Jimmy Antle immediately drove to the farm, entering by a private road which Oliver owned.

The detectives drove past Oliver's residence for approximately three-quarters of a mile to a barn. There they were mistaken for hunters, and advised to leave the premises. The record does not indicate whether the detectives identified themselves as law enforcement officers, but they did fail to heed the warning and did continue across the property. The private road was blocked at the barn by a locked gate. A "No Trespassing" sign was posted on the gate, the fourth such sign that had been seen by Hadley and Antle while crossing the farm. Unable to proceed further by car, the two men slipped through a hole in the

gate and continued on foot across the farm for one-quarter mile. They reached a field which had been leased out by Oliver, and found marijuana growing there. After discovering the marijuana crops, the detectives left the farm and were met on a public road by Oliver. The appellee was arrested and then taken back to his farm where he arranged for a tractor to destroy the marijuana. At Hadley's request, Oliver directed the detectives to a second leased area where more marijuana was found and destroyed.

The constitutional issue raised by the search of Oliver's property and the subsequent exclusionary ruling by the district court requires that we determine whether the "open field" doctrine announced in *Hester* v. *United States*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), applies to the facts of this case. The Supreme Court held in *Hester* that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." *Id.* at 59, 44 S. Ct. at 446. The practical effect of this holding was to prohibit the warrantless search of a residence and curtilage while permitting such a search of any area outside the curtilage. *United States* v. *Hassell*, 336 F. 2d 684, 685 (6th Cir. 1964), *cert. denied*, 380 U. S. 965, 85 S. Ct. 1111, 14 L. Ed. 2d 155 (1965). *See also United States* v. *Ramapuram*, 632 F. 2d 1149 (4th Cir. 1980), *cert. denied*, ____ U. S. ____, 101 S. Ct. 1739, 68 L. Ed. 2d 225 (1981); *United States* v. *Williams*, 581 F. 2d 451 (5th Cir.), *cert. denied*, *William* v. *United States*, 440 U. S. 972, 99 S. Ct. 1537, 59 L. Ed. 2d 789 (1979). The curtilage was defined as the area immediately surrounding the residence, usually that portion of land commonly referred to as the "family yard." *See generally United States* v. *Hester*, *supra*; *United States* v. *Hassell*, *supra*; *The Supreme Court*, 1967 Term, 82 Harv. L. Review, 63, 189 (1968); *Note*, 76 Mich. L. Rev. 1154, 177-79 (1979).

Under the *Hester* test, the evidence obtained during the search of Oliver's field could be viewed as admissible since the field was not within the curtilage of the residence. However, the district court concluded that the *Hester* test, as modified by *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), requires suppression of the evidence. We agree.

The Supreme Court held in *Katz* that the Fourth Amendment prohibition against warrantless searches and seizures protected people not places. 389 U.S. at 351, 88 S. Ct. at 511. The Court stated that the test for determining the legality of a warrantless search was no longer a question of whether the search was conducted in a "constitutionally protected area," *i.e.* the curtilage, rather it was whether the individual whose property was searched had a "reasonable expectation of privacy" in the area searched. *Id.*

Thus, *Katz* shifted the emphasis of the test from an inquiry into common-law property distinctions to an inquiry in which the individual's reasonable expectations of privacy became the focal point. Justice Harlan, concurring in *Katz*, articulated the new criteria more fully by outlining a two-pronged test for determining the reasonableness of the individual's expectation of privacy:

> The rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' 389 U.S. at 361, 88 S. Ct. at 516.

Oliver clearly had a subjective expectation of privacy in the field searched. The locked gate, the numerous "No Trespassing" signs and the private road all taken together constitute ample evidence of a subjective expecta-

tion of privacy. Since Oliver clearly established the fact that he had a subjective expectation of privacy in the farm land, the only remaining question is whether society recognizes that expectation as a reasonable one. Recent case law has established that a subjective expectation of privacy is reasonable if it: (1) is a privacy expectation normally shared by people in that setting, and (2) it falls within some tolerance level which represents the limits of what society can accept given its interest in law enforcement. *See generally Mincey* v. *Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Rakas* v. *Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *United States* v. *Dorsey*, 591 F. 2d 922 (D.C. Cir. 1978); 82 Harv. L. Rev. 189, 192 (1968).

We agree with the district court that Oliver's expectation of privacy was objectively reasonable. Society's interest in law enforcement is not unduly hampered by requiring a warrant prior to searching a private field which has been reached through a private road exhibiting several "No Trespassing" signs and blocked by a locked gate, unless there is an imminent threat of destruction of the evidence or there exists a high probability that the evidence will cause serious bodily harm. We are presented with no such emergency situation here.

We note that we are not alone in our belief that the "open fields" exception to the warrant requirement can no longer be automatically invoked to validate a warrantless search and seizure which takes place outside the curtilage. *United States* v. *Williams*, *supra* at 454 (the court stated that a property owner has a reasonable expectation of privacy in an outbuilding encompassed by a fence which might or might not include the residence); *United States* v. *DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980) ("*Katz* compels a more sensitive reading of the Fourth Amendment . . . Instead of declaring entire areas as

outside of Fourth Amendment protection, I believe *Katz* compels an analysis of the particular type of surveillance, and its effect on the privacy and security of citizens."); *State* v. *Lakin*, 588 S. W. 2d 544, 549 (Tenn. 1979) (It is not unreasonable to require a police officer to obtain a warrant from an impartial magistrate prior to a search of an open field where marijuana is allegedly growing); *State* v. *Wert*, 550 S. W. 2d 1, 3 (Tenn. Crim. 1977) (50-acre farm which was enclosed by a fence is protected from a warrantless search); *State* v. *Brady*, 379 So. 2d 1294, 1296 (Fla. App. D4 1980) (there is a reasonable expectation of privacy in a 1,800-acre tract of land which is fenced, locked, occupied, and posted); *Burkholder* v. *Superior Court*, 158 Cal. Rptr. 86, 91 (1979) (an individual has a subjective expectation of privacy which is objectively reasonable in a partially fenced-in field, separated from other land by a locked gate).

We note that our decision in *United States* v. *Hassell*, *supra*, which held that "open fields" were automatically exempted from the warrant requirement, is inconsistent with the Supreme Court's decision in *Katz*. It is therefore no longer the law of this circuit.

Accordingly, the order of the district court, Judge Johnstone, suppressing the evidence obtained from the search of appellee's property is affirmed.

APPENDIX D

No. 80-5437

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

RAY E. OLIVER, a/k/a EDWARD RAY OLIVER, - - - - - *Defendant-Appellee.*

On Appeal From the United States District Court for the Western District of Kentucky

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Decided and Filed May 5, 1982.

Before: EDWARDS, Chief Judge; LIVELY, ENGEL, KEITH, MERRITT, BROWN, KENNEDY, MARTIN and JONES, Circuit Judges, sitting *En Banc*.

BAILEY BROWN, Circuit Judge, delivered the opinion of the Court in which ENGEL, MERRITT, KENNEDY, and MARTIN, Circuit Judges, joined. KEITH, Circuit Judge, (pp. 38-65) filed a separate dissenting opinion which was joined in by EDWARDS, Chief Judge, LIVELY and JONES, Circuit Judges. LIVELY, Circuit Judge, (pp. 65-66) also filed a separate dissenting opinion.

BAILEY BROWN, Circuit Judge. In *Hester* v. *United States*, 265 U. S. 57 (1924), the Supreme Court, in an opinion by Justice Holmes, unanimously held that the protec-

tion of the Fourth Amendment does not extend to open fields. This court, in *United States* v. *Hassell*, 336 F. 2d 684 (6th Cir. 1964) (per curiam), *cert. denied*, 380 U. S. 965 (1965), citing *Hester*, also held that Fourth Amendment protection does not apply to open fields. In the instant case, a panel of this court, relying on analysis it derived from *Katz* v. *United States*, 389 U. S. 347 (1967), held that the owner of an open field may have Fourth Amendment protection if he reasonably expects privacy and that therefore the holdings in *Hester* and *Hassell*, to this extent, no longer stand. *United States* v. *Oliver*, 657 F. 2d 85 (6th Cir. 1981). We conclude, on the contrary, that *Hester* is still good Fourth Amendment law, that *Katz* does not require an *ad hoc* consideration of the facts of each case to determine whether the owner of an open field reasonably expected privacy and that therefore *Hassell* is still the law of this circuit.

In the case before us, the appellee, Oliver, is a retired farmer who lives on his farm in the Western District of Kentucky and leases parts of it to others. In July, 1980, narcotics agents of the Kentucky State Police received an anonymous tip that marijuana was being raised on the farm. They had heard before rumors to this effect and so they decided to investigate.[1]

The agents approached Oliver's farm on Kentucky Highway 379 and turned off on a road on Oliver's land that leads past his house and then past a barn near the back end of the farm. A short distance beyond the house the agents encountered a locked gate that blocked the road, and there they parked their car and walked around the gate on a path

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[1]Appellant, the United States, does not contend that the agents had probable cause for the search or that, if they did have such cause, there were exigent circumstances that would excuse getting a search warrant.

adjacent to it. There were "No Trespassing" signs as one turned off Highway 379 and along the road leading to the house and another at this gate. The agents on foot continued down this road to the barn, which was located about three-fourths of a mile beyond the house. At the barn was a parked camper but no person was present and the agents continued further on this road. Shortly thereafter, someone appeared near the camper and called to the agents to come back, explaining that hunting was not allowed, at which time the agents started back to the camper, announcing that they were Kentucky State Police. When they got back to the camper, however, no one was there. The agents then resumed their investigation, which resulted in their finding two open fields of marijuana at the back end of the farm.

The Cumberland River bounds the farm just beyond these fields of marijuana. The marijuana could not be seen by anyone standing on land other than Oliver's. These fields were located about one mile from Oliver's house by road and almost that far in a direct line. The fields had been leased by Oliver to some strangers.[2]

After Oliver's arrest and indictment for knowingly and intentionally manufacturing marijuana, 21 U.S.C. § 841(a)(1)(1976) and 18 U.S.C. § 2 (1976), the district court upheld Oliver's motion to suppress the marijuana evidence, relying on analysis it derived from *Katz*. The district court held that this search required a warrant because, under the circumstances presented here, Oliver had an expectation of privacy and that the expectation was a reasonable one. The government then took this appeal. A panel of this court agreed with the analysis and conclusion of the

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[2]The United States does not question Oliver's standing to raise this Fourth Amendment issue but does rely on this leasing to the extent, if any, that Oliver's expectation of privacy is an issue.

district court and affirmed (657 F. 2d 85 (6th Cir. 1981)) after which this court heard the appeal *en banc*.

In *Katz* v. *United States*, 389 U. S. 347 (1967), the Court held that it was error to admit into evidence the defendant's end of a telephone conversation that was recorded, without a warrant, by means of a device placed on the *outside* of a telephone booth. "For the Fourth Amendment protects people, not places." *Id.* at 351. Thus, reasoned the Court, since Katz had a reasonable expectation of privacy when he entered the booth, closed the door, and paid the toll for the call, it was a violation of the Fourth Amendment to record the conversation without a warrant. In the instant case, it is argued that, since under the circumstances Oliver had a reasonable expectation of privacy with respect to the fields of marijuana, it follows that he, too, was entitled to Fourth Amendment protection. We disagree with this conclusion for several reasons.[3]

In the first place, it is apparent that the Court in *Katz* was called upon to consider application of the Fourth Amendment under circumstances that could not have been contemplated at the time the Amendment was formulated and adopted. As the opinion for the Court by Justice Stewart states: "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.* at 352. Moreover, in his concurring opinion, Justice Harlan states that the prior holding of the Court in *Goldman* v. *United States*, 316 U. S. 129 (1942), "that electronic surveillance accomplished without the physical penetration of petitioner's

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[3]It is, of course, immaterial that the narcotics agents here may have committed a trespass under state law. Indeed, even if Kentucky law had required a warrant, this would not affect our decision of this Fourth Amendment question. *United States* v. *Hassell*, 336 F. 2d 684, 685 (6th Cir. 1964), citing *Elkins* v. *United States*, 364 U. S. 206 (1960).

premises by a tangible object did not violate the Fourth Amendment," *Katz, supra* at 362, must be overruled because "[i]ts limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* On the other hand, here we are called upon to apply the Fourth Amendment to an open field. As Justice Holmes said in *Hester*: "[T]he special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Com. 223, 225, 226." 265 U. S. at 59.

A second reason why we conclude that *Katz* did not amend the existing open fields doctrine is that *Katz* itself recognizes the continuing validity of the *Hester* proposition that the Fourth Amendment does not protect an owner as to his open fields. In the opinion for the Court, Justice Stewart alludes to the fact that the parties to that litigation considered it to be common ground that, on the basis of *Hester*, an open field is outside the reach of the Fourth Amendment. 389 U. S. at 351 n.8. The opinion does not suggest that under certain circumstances it would not be. More importantly, in his concurring opinion, Justice Harlan states: "I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U. S. 383 . . . , and unlike a field, Hester v. United States, 265 U. S. 57 . . . , a person has a constitutionally protected reasonable expectation of privacy . . . ." *Id.* at 360 (Harlan, J., concurring) Justice Harlan further states:

> As the Court's opinion states: "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people.

> Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.

Id. at 361.

We conclude, therefore, that *Katz* does not require an *ad hoc* investigation of the circumstances to determine whether the owner of an open field had an expectation of privacy and whether the expectation was reasonable. Rather, we conclude that under *Hester* and *Katz* any expectation of privacy that an owner might have with respect to his open field is not, *as a matter of law*, an expectation that society is prepared to recognize as reasonable.[4]

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[4]The district court's decision that Oliver had a reasonable expectation of privacy is largely based on the fact that the narcotics agents passed "No Trespassing" signs and a locked gate in making the search. If, however, they had made the search by helicopter, or on the ground but from another direction where there were no signs or a locked gate, there would have been no reasonable expectation of privacy. Thus the decision of the district court would seem to add still another refinement to Fourth

(Footnote continued on following page)

We further point out, in support of our conclusion that the open fields doctrine as stated in *Hester* survived the *Katz* decision, that the Supreme Court has on several occasions since *Katz* referred to the *Hester* decision without indicating that its principle has been diluted. *See, e.g., Rakas* v. *Illinois,* 439 U. S. 128, 143 n.12 (1978); *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 352 (1977); *United States* v. *Santana,* 427 U. S. 38, 42 (1976); and *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861, 865 (1974).

Finally, it was suggested at argument that, since these marijuana fields were not observable while standing on land other than Oliver's, these fields were not "open fields" within the meaning of *Hester* and *Hassell.* It is clear, however, that the rule in these cases is meant to distinguish between curtilage and land outside the curtilage. *See, e.g., United States* v. *Whitmore,* 345 F. 2d 28, 29 (6th Cir. 1965) (per curiam), *cert. denied sub nom. Anderson* v. *United States,* 382 U. S. 991 (1966), citing and relying on both Justice Holmes's opinion in *Hester* and the opinion of this court in *Hassell.* These fields were not within Oliver's curtilage.

We believe that no privacy rights inhere and the Fourth Amendment does not protect an open field of marijuana. It would protect a person in an open field or a house built there but not the field itself. We do not understand what the concept is behind the dissenting view that some element of privacy attaches to an open field, a field empty of persons and empty of the houses, papers and effects of persons. The dissenting opinion does not suggest what that concept is or how privacy comes into play. The Fourth Amendment and other laws protecting privacy create the conditions and the

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(Footnote continued from preceding page)

Amendment law—i.e., that protection would depend upon the direction from which the search was accomplished. *Hester,* in its pristine simplicity, has obvious advantages.

context for many relationships based on intimacy, friendship and trust. These laws establish an environment in which individual emotional and mental processes can develop freely without surveillance or interference. The legal principles that protect privacy, therefore, do not protect the desert island, the mountain top or the open field—even one the owner has posted with a "no trespass" sign. The human relations that create the need for privacy do not ordinarily take place in these settings. The only significant interest at stake here—a property owner's interest in excluding others from his possessions—is not sufficient alone to bring into play legal principles protecting privacy.[5]

The order of the district court suppressing the evidence is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

KEITH, Circuit Judge, with whom Chief Judge EDWARDS, Circuit Judge LIVELY and Circuit Judge JONES join dissenting.

We respectfully dissent from the opinion taken by the Court in this very important case. Today our court adopts a *per se* rule with respect to the open fields doctrine. This Court's position is contrary to that of the First, Second, Fourth, Fifth, Seventh and Tenth Circuits who have rejected the *per se* rule in favor of a more reasonable and flexible rule similar to the rule set forth in this dissent. We also note that a majority of the state courts, including California, Florida, Illinois, Louisiana and Hawaii, have also rejected the *per se* rule. Therefore, our Court's intransient position is difficult to understand.

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[5]If we were free to make this decision as if it were a mere policy matter, our decision would be the same. The reason is that, in weighing the privacy interest of the owner of open fields against the public interest in law enforcement's making random investigations to detect the production of drugs and moonshine, the public interest should prevail.

Appellee, Ray Edward Oliver was indicted and charged with manufacturing marijuana in violation of 21 U.S.C. §841(a) and 18 U.S.C. §2. At a pre-trial suppression hearing, the district court sustained Oliver's motion to exclude evidence obtained from the warrantless search of his property. The Oliver property was fenced and posted with "No Trespassing" signs. The evidence the government sought to admit consisted of marijuana discovered growing in a field on Oliver's property. The marijuana was not visible from the public road or the land of Oliver's neighbors.

On appeal, the government argued that a warrantless search of the land beyond the curtilage[1] can never violate the Fourth Amendment as a matter of law. The government contended the district court's refusal to admit the marijuana found growing on Oliver's field was contrary to the Supreme Court's holding in *Hester* v. *United States*, 265 U. S. 57 (1924). A panel of this Court considered this question and others raised in the appeal on a previous occasion. *See United States* v. *Oliver*, 657 F. 2d 85 (6th Cir. 1981). The panel held that officers who conducted a warrantless search which included traveling a mile and a half on the landowner's private road past several 'No Trespassing" signs, and walking around a locked gate to view growing fields of marijuana violated the landowner's reasonable expectation of privacy guaranteed by the Fourth Amendment.

The Court granted en banc consideration of this appeal to address the following two issues: 1) Whether a warrantless search beyond the curtilage may violate the Fourth Amendment; and 2) Whether a warrantless search con-

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[1]The "curtilage of the house is frequently defined as the domestic use immediately surrounding a dwelling which usually is fenced in with the dwelling." *See United States* v. *LaBorge*, 267 F. Supp. 686, 692 (D. Md. 1967); *United States ex rel. Saiken* v. *Bensinger*, 546 F. 2d 1292, 1296 (7th Cir. 1976).

ducted by the Kentucky State Police on posted land violated the landowner's reasonable expectation of privacy.

FACTS

Appellee, Ray Edward Oliver ("Oliver") is a 62 year old retired farmer. His 200 acre farm is located in rural Kentucky, 20 miles from the nearest town, Jamestown, Kentucky. He lives on his farm with his wife and daughter. Much of the Oliver farm is leased to third parties who use the land for agricultural purposes.[2] Oliver owns no farm equipment, but does raise hogs.

On or about July 18, 1980, the Kentucky State Police received an anonymous tip that marijuana was being cultivated on the Oliver farm.[3] Kentucky State Police Detectives Ben Hadley and Jimmy Antle decided to investigate the tip that afternoon. The detectives made no attempt to secure a search warrant[4] or obtain permission to search the Oliver farm. The detectives wore plain clothes and drove a black Firebird, an unmarked state police vehicle.

The detectives approached the Oliver farm on Kentucky Highway 379, a paved public road. The detectives gained access to the Oliver farm by turning off Highway 379 and onto a gravel, private road on Oliver's land. Oliver owned the land on both side of the gravel road. The detectives admitted that they knew the gravel road was Oliver's private road. The greater the distance from the public road the narrower the gravel road became. "No Trespassing" signs

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[2]A total of four people leased portions of the Oliver farm.

[3]Detective Hadley also testified that "people in the community" had "more or less said" that "it didn't look right down on Ray's farm."

[4]The government admits that the detectives did not have probable cause to search the Oliver farm. The government also concedes that there were no exigent circumstances which would excuse the lack of a search warrant.

were posted along the gravel road in at least four locations. The officers saw the signs, but ignored their warning.

Hadley and Antle drove past the signs and travelled several hundred yards before they passed the Oliver home. The gravel road became markedly narrower after it passed the Oliver home. The agents never attempted to obtain permission to search the Oliver farm. Instead, they proceeded an additional ¾ of a mile further on the Oliver property. Finally, a locked metal gate blocked their path.

The detectives parked and exited the car. The officers could see no contraband. Fences were on either side of the gate. At one end of the gate a path led through a gap in the fence. A "No Trespassing" sign was posted on the locked metal gate. The detectives admitted seeing the sign, but again ignored the warning. The detectives followed the path around the locked gate.

A barn and a truck camper were located several hundred yards beyond the gate. The camper was parked in front of the barn. Unnamed third persons cultivating the marijuana inhabited the camper as a "home."[5]

The detectives approached the barn, looked around, but did not enter the barn. The detectives did not see anyone. The marijuana fields could not be seen from the barn. The detectives continued their search on foot. The gravel road had become an earthen path. The officers proceeded approximately ¼ of a mile further through fields and wooded areas on a curved earthen path. Shouts halted their progress.

An unidentified man standing in front of the camper hollered, "No Hunting Is Allowed, Come Back Here!" Hadley and Antle halted their progress, turned, and shouted that they were State Police. Hadley and Antle's search thus

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[5]The camper was equipped with a refrigerator. Camping supplies were nearby. Eggs, bacon, and "iced down beer" were also present in the camper.

far had not detected the presence of marijuana on the Oliver farm. The two officers began to walk back to the camper. The man who had yelled was not present when Hadley and Antle arrived at the camper. Detective Hadley looked inside the camper, but still did not see anyone. He closed the door of the camper. The two men began their search anew.

The officers returned to the location where shouts had halted their progress and continued walking. Eventually, they entered a secluded field and saw marijuana. The marijuana was located in a field which had been leased to third persons not named in this action. The field was located 1 and 4/10 mile from the Oliver home. After discovering the marijuana Detectives Hadley and Antle returned to their car and left the farm. They met Oliver on the public road. Oliver was arrested and taken back to his farm. Later, Oliver arranged for a tractor to destroy the marijuana. At Hadley's requests, Oliver directed the detectives to a second leased area where more marijuana was found and destroyed.

The marijuana fields were "highly secluded: they were bounded on all sides by woods, fences and embankments." In fact, the fields were not visible from the Cumberland River, the barn, the locked metal gate, the Oliver home, the public highway, the lands owned by Oliver's neighbors, or the nearest point of public access. The Oliver farm was posted and fenced. Within two weeks after the marijuana had been destroyed on the Oliver farm, the Kentucky State Police began using a helicopter to conduct surveillance of suspected marijuana fields in the area.

I. THE OPEN FIELD EXCEPTION TO THE FOURTH AMENDMENT

A. Hester v. United States

The Open Fields Doctrine states that the Fourth Amendment does not extend to activities conducted in any area beyond the curtilage of a home. The continued validity of this doctrine has been the subject of much debate since the seminal decision in *Katz* v. *United States*, 389 U. S. 347 (1967). This en banc hearing is a poignant illustration of the heated confusion surrounding the doctrine. Much of the confusion has been produced by a failure to distinguish between the holding in *Hester* v. *United States*, 265 U. S. 57 and the birth of the Open Fields Doctrine in *Olmstead* v. *United States*, 277 U. S. 438 (1928).

In *Hester*, the Supreme Court held that federal agents could trespass on an area where the public was not excluded during a warrantless search and view that which was exposed to the public without violating the Fourth Amendment. That which is observable by the public is observable by a federal agent without a warrant. Revenue agents had prior information concerning Hester's involvement in the manufacture of illegal moonshine whiskey. Based on this information, two agents approached the Hester home at night. The agents concealed themselves 50 to 100 yards away from the house when an automobile approached. Later, the agents saw Hester come out of the house and hand Henderson a quart bottle. An alarm was given. Hester and Henderson ran. Both men dropped bottles which were later determined to contain moonshine whiskey. Hester alleged that the search and seizure was illegal because the agents did not have a search warrant and had trespassed on his land. The Court disagreed. "This evidence was not obtained by the entry into the house

and it is immaterial to discuss that." *Id.* at 58. "This special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to [events observable from] the open fields." *Id.* at 59.

Three years later in *United States* v. *Lee,* 274 U. S. 559 (1927), the Supreme Court reaffirmed the holding in *Hester.* A Coast Guard patrol boat followed a motor boat which was suspected of being a rum runner. Sometime after sunset, the Coast Guard lost the motor boat in the fog. When the motor boat was again located, cases of liquor were on its deck. Defendant Lee and two associates were arrested. Lee's conviction was vacated in the Court of Appeals on the ground that the search and seizure was illegal. The Supreme Court reversed. The contraband was visible to the boating public on the high seas.

> "[N]o search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution. Compare *Hester* v. *United States,* 265 U. S. 57."

B. Olmstead Open Fields Doctrine

The following year, the Open Fields Doctrine was born in *Olmstead* v. *United States,* 277 U. S. 438 (1928). The doctrine is a combination of the "open field" phrase coined

in *Hester*[6] and *Olmstead's* holding that the Fourth Amendment is not violated unless there has been "an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." *Olmstead*, 277 U. S. at 466.

In *Olmstead*, federal prohibition officers tapped the phones of Olmstead and several of his associates. The wire taps were installed without trespass upon any property of the defendants. A massive conspiracy to import, possess, and sell liquor was uncovered as a result of the taps. Olmstead alleged that the evidence derived from the phone tap constituted an illegal search and seizure. The court disagreed and adopted an analysis which focused on physical invasion of "constitutionally protected areas."

> "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." *Id.*, at 464.
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> "Justice Bradley in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargment of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

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[6]In *Hester*, the term "open field" was used to describe the area beyond the curtilage from which the public was not excluded. Note that *Olmstead* uses the label "open field" to denote any area beyond the curtilage.

Hester v. *United States*, 265 U. S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers, or effects. *United States* v. *Lee*, 274 U. S. 559, 563; *Eversole* v. *State*, 106 Tex. Cr. 567." *Id.*, at 465.

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"Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible materials effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment." *Id.*, at 466.

After the seminal decision in *Olmstead*, the *Hester* holding could best be stated as follows: the open field area beyond the curtilage is not an area entitled to Fourth Amendment protection. The Olmstead Open Fields Doctrine's core, therefore, was that an open field was not a "constitutionally protected area."[7] The locational analysis inherent in the Open Fields Doctrine was woodenly applied

[7] *Olmstead's* per se rule enabled law enforcement officials to conduct warrantless searches of any area outside the curtilage at any time for any reason.

for decades.[8] *See, e.g., United States* v. *Hassell,* 336 F. 2d 684, 685 (6th Cir. 1964).

C. Katz v. United States

Katz v. *United States,* 389 U. S. 347 overruled the Fourth Amendment "constitutionally protected area" or actual physical invasion analysis epitomized by *Olmstead. Katz* holds that "the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures." *Id.* at 353. However, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *See Lewis* v. *United States,* 385 U. S. 206, 210; *United States* v. *Lee,* 274 U. S. 559, 563." *Id.* at 351.

In *Katz,* FBI agents bugged a public telephone booth by attaching an electronic listening and recording device to the outside of the booth. Katz alleged that the bugging violated the Fourth Amendment. The government disagreed. The parties compiled competing lists of "protected areas" for the Court's consideration. The parties agreed that a private home was a protected area, citing *Weeks* v. *United States,* 232 U. S. 383, but that an open field was not, citing *Hester* v. *United States,* 265 U. S. 57. *Katz* 389 U. S. at 351 n.8.

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[8] In *Hassell* federal agents suspected Hassell of operating an illicit still. Agents visited the defendant's premises in the company of Hassell, sniffed around his barnyard, and satisfied themselves that the odor did not emanate from there. The agents subsequently followed the scent to an adjacent open field and found the still. The court disposed of Hassell's contention that the search by the agents was illegal in a single sentence: "Under federal law the search of open fields without a search warrant is not constitutionally 'unreasonable.' *Hester* v. *United States,* 265 U. S. 57 (1926)." *Id.,* at 685.

The Court rejected the parties contentions stating "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'." *Id.* at 350. "We have never suggested that this concept can serve as a talismanic solution every Fourth Amendment problem." *Id.* at 351 n.9. "This effort to decide whether or not a given "area", viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *See Lewis* v. *United States*, 385 U. S. 206, 210; *United States* v. *Lee*, 274 U. S. 559, 563." *Id.* at 351. The Court also rejected the Government contention that the activities of the agents should not be tested by the Fourth Amendment because the technique they employed did not physically penetrate the phone booth from which Katz placed his calls. The Court held:

> "It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States*, 277 U. S. 438, 457, 464, 466 . . . Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any tresspass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which the decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under . . . local property law." *Silverman* v. *United States*, 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized

that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.* at 352-353.

Justice Harlan's concurring opinion in *Katz* also rejects *Olmstead's* intrusion into "constitutionally protected area" analysis. He, too, reasoned that "the Fourth Amendment protects people, not places."[9] However, he acknowledged that the measure of protection the Amendment affords to those people generally requires reference to a place. He announced a two-part test to determine whether an activity conducted in a given place is entitled to Fourth Amendment protection. "First, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation is one that society is prepared to recognize as 'reasonable.' " *Katz*, 389 U. S. at 361. The two examples which follow this test demonstrate that an expectation of

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[9]Justice Harlan opined that *Katz* overruled *Olmstead*. *Katz*, 389 U. S. at 362.

privacy can virtually never be reasonable if the activity or conversation is exposed to the public. "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. *Cf. Hester* v. *United States, supra.*" *Id.*, at 361.

II. THE MODERN OPEN FIELDS DOCTRINE

Katz radically altered Fourth Amendment analysis in at least two major respects material to this action. First, the narrow holding in *Hester* that federal agents could trespass onto an area from which the public was not excluded and view that which was exposed to public view, without violating the Fourth Amendment remained viable. Second, the Olmstead Open Fields Doctrine that the area beyond the curtilage was not a "constitutionally protect area" was overruled. Consequently, warrantless searches for objects not exposed to the public located in areas where the public is excluded are subject to the "reasonable expectation of privacy" test of *Katz*.

Air Pollution Variance Board v. *Western Alfalfa*, 416 U. S. 861 (1974), reaffirmed the continued validity of Hester's narrow holding. In *Western Alfalfa* the court held that a federal agent could trespass on an area where the public was not excluded during a warrantless search and view that which was exposed to the public without violating the Fourth Amendment. A state inspector trespassed on the outdoor premises of a business establishment without its knowledge or consent. The inspector entered the business premises to conduct a pollution test of smoke being

emitted from the business's chimneys. *Id.* at 862-863. Justice Douglas speaking for a unanimous Court held:

> "The field inspector did not enter the plant or offices. He was not inspecting stacks, boilers, scrubbers, flues, gates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester* v. *United States*, 265 U. S. 57, 59 speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded. . . . Depending on the layout of the plant, the inspector may operate within or without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in *Hester*." *Id.* at 865.

Western Alfalfa defines the contours of the Open Fields Doctrine. The Supreme Court did not simply ratify the per se rule of the Olmstead Open Fields Doctrine. The invalidity of the Olmstead Open Fields Doctrine is amply demonstrated by the Court's reliance on a fact not affirmatively established in the record. The Court emphasized that "we are not advised that he was on premises from which the public was excluded. . . ." This statement is particularly significant for the public's access to the business premises would have been immaterial if the Court had based its decision the Olmstead Open Fields Doctrine. *Olmstead's* per se rule would have enabled the inspector to trespass on the premises without regard to whether the public was excluded or not.

The rationale underlying *Hester*, the open fields exception to the Fourth Amendment, and *Western Alfalfa* was

articulated in *Marshall* v. *Barlow's Inc.*, 436 U. S. 307 (1978). The Court distinguished between a warrantless administrative search conducted over the objection of the landowner and a warrantless search conducted in an area where the public is not excluded. The Court concluded that without a search warrant, the government agent is in no better position than a member of the public. Observations capable of being made by the public can be made by government agents without a warrant.

> "Employees are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The Government inspector, however, is not an employee. Without a warrant he stands in no better position that a member of the public. What is observable by the public is observable, without a warrant, by the Government inspector as well. The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agent." *Id.* at 315.

In sum, the Open Fields Doctrine's premise is that government agents without warrants are in the same position as the public and may make observations from any location from which the public is not excluded. The visibility of the object and the public's access to the location are the two determinants of whether the Open Fields exception applies. Objects exposed to public view, even when located in areas from which the public is excluded, are not entitled to Fourth Amendment protection. The owner has not exhibited an intent to keep the item private, thus the seizure of the item will not violate his reasonable expectation of privacy. *See Katz*, 389 U. S. at 361 (Harlan concurring).

On the other hand, the open fields doctrine enables government agents to trespass onto private areas from which the public is not excluded and make observations. *See Hester*, 265 U. S. at 58-59; *Western Alfalfa*, 416 U. S. at 865. *See also, Marshall*, 436 U. S. at 315.[10]

The open fields doctrine has frequently been utilized to uphold warrantless searches conducted on private property where the public has not been excluded. In *United States* v. *Miller*, 589 F. 2d 1117 (1st Cir. 1978), the First Circuit held that a warrantless search of a secluded private peninsula was permissible pursuant to the open fields exception to the Fourth Amendment. The court found that "the appellant made no attempt to secure his open land from unwanted visitors." The court stated: "The land involved here was not posted; there was no fence or chain to impede visitors; the officers approached openly in broad daylight. Thus, the entry was permissible." *Id.* at 1134.

In *Patler* v. *Slayton*, 503 F. 2d 472 (4th Cir. 1974), the Fourth Circuit held that the open fields doctrine as announced in *Hester* v. *United States*, 265 U. S. 57 (1924) enabled police officers to conduct a warrantless search for spent bullets located in a picnic area near the house. "It had been established that the farm was not posted against trespassers." *Patler* v. *Commonwealth*, 211 Va. 448, 177 S. E. 2d 618, 620 (1970), *cert. denied, Pater* v. *Virginia*, 407 U. S. 909 (1972). *See United States* v. *Ramapuram*, 632 F. 2d 1149, 1155 (4th Cir. 1980), *cert. denied*, 450 U. S. 1030

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[10]The Open Fields Doctrine enables government agents to trespass onto private land from which the public is not excluded and make observations. *See Hester*, 265 U. S. at 58-59; *Western Alfalfa*, 416 U. S. at 315. The Plain View Doctrine sanctions inadvertent observations made by government agents who were lawfully in a location. *See Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).

(1981); *United States* v. *Van Dyke*, 643 F. 2d 992, 994 (4th Cir. 1980).

In *United States* v. *Lace*, ____ F. 2d ____, Slip Op. No. 81-1098 (2d Cir. January 5, 1982) the Second Circuit held that observations made by police officers while trespassing on private land were admissible. "The land was not posted and was used freely by hunters. Outsiders could enter the open property at will. Therefore, Butt's [the defendant's] action outside the buildings could easily be observed by any person going on the land. What was observable by the general public was observable without a warrant by the police as well."

In *United States* v. *Edmonds*, 611 F. 2d 1386 (5th Cir. 1980) *rehearing denied*, 615 F. 2d 919, federal agents seized several hundred bales of marijuana being unloaded at Morgan's Dock, a commercial fishing business and dock. To reach the dock the agents drove down a dirt road. The road was posted with a sign which read, "private road—no trespassing." The defendants argued that nothing the agents observed was admissible because Morgan's Dock was private property and the officers were trespassers. The court disagreed.

> "While there was a "no trespassing" sign on the entrance road leading to the premises, an officer who had resided in the area for 23 years testified that the reputation in the community was to the effect that the public was welcome to use the dock area and that the public did use it. The district court found that despite the sign the public had long had free access to the dock, and that conclusion is not plainly erroneous. Other than the presence of the sign, there was no evidence that the dock was "private" to owner Morgan and those specifically authorized to use it. This was not a dock for private use for either fishing, or em-

barkation and debarkation of boats, or docking and storage. It was a place not only where boats docked and were unloaded but also a place of business activity where necessarily persons and vehicles had to come and go. The parking lot was open. The officers were not trespassers. They invaded the expected privacy of no one when they drove into the parking lot at the dock." *Id.* at 1388. *Accord Ehlers* v. *Bogue*, 626 F. 2d 1314, 1315 (5th Cir. 1980) (open fields doctrine enables county inspector to trespass and make observation from location where public was not excluded).

In *Patterson* v. *National Transportation Safety Board*, 638 F. 2d 144 (10th Cir. 1980), a federal aviation safety inspector observed an airplace while it was in an open area of a private airport. The Tenth Circuit held that the observations were an admissible warrantless search under the open field doctrine. The Court held:

"Cedar Valley Airport, as we understand it, is a private airport, as opposed to a municipal airport. From the record, it is unclear who owns it. It would appear that the public was allowed access to the airport proper even though it was privately owned and operated. Be all that as it may, it would appear that Broadbent's inspection was made in an open area. The plane had not been placed in any hangar or building. Under such circumstances, the "search" of Patterson's plane, if indeed it be a search, comes well within the "open fields" exception to the Fourth Amendment. *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U. S. 861 (1974) and *Hester* v. *United States*, 265 U. S. 57 (1924)." *Id.* at 146.

In *United States* v. *Pruitt*, 464 F. 2d 494 (9th Cir. 1972), custom officials observed two individuals unload large boxes

from a van "in a stretch of open country" just off the highway. During warrantless searches of the area the officers uncovered boxes and duffel bags containing marijuana. The court held that no reasonable expectation of privacy was violated by the search. "Any casual passerby would feel perfectly free to ascertain what it was what he had found." *Id.* at 496, *Accord United States* v. *Freie*, 545 F. 2d 1217 (9th Cir. 1976), *cert. denied, Gangadean* v. *United States*, 430 U. S. 966 (1977).

In *United States* v. *Balsamo*, 468 F. Supp. 1363 (D. Maine 1979) the court held that the open fields doctrine enabled police officers to conduct a warrantless search on private property within a subdivision.

> "The officers' entry, however violated no "legitimate" or reasonable expectation of privacy of the defendants, and thus no Fourth Amendment interest was involved. A large sign advertising lots for sale stood at the entrance to the subdivision, inviting entry by the public to inspect the property. There were no "No Trespassing" signs or fences restricting access to the property. The owner-developer relied on local police to patrol the subdivision. The use of the common roads was not monitored in any way. Any subjective belief defendants may have had that their activities would go undetected was neither legitimate or reasonable." *Id.* at 1379.

By contrast courts have consistently held that the open fields exception is not applicable where the warrantless search was conducted in an area where the public was excluded. In *United States ex rel. Gedko* v. *Heer*, 406 F. Supp. 609 (W.D. Wis. 1975), vacated without op., dismissed without op., *Gedko* v. *Cady*, 588 F. 2d 340 (7th Cir. 1978), police officers trespassed onto private property to observe

the activities of an individual suspected of cultivating marijuana. The government attempted to use the open fields doctrine to justify their warrantless search. The court held that the open fields exception to the Fourth Amendment was not applicable.

> "Petitioner established in state court that his property was fenced; that the law enforcement officers entered onto his property by climbing over the fence; that no express consent was given to the law enforcement officers to enter onto his property; that his property was wooded and hilly; and that he and his wife were the owners of the property, which was a 160 acre farm located in rural south-western Wisconsin. In addition, there was undisputed testimony at the suppression hearing that the nearest public road was approximately six-tenths of a mile from the farm yard and that there was a No Trespassing sign posted on the property at the gate where the land runs into the highway.
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> In my opinion, these facts demonstrate that petitioner had a reasonable, exhibited, and justifiable expectation of privacy as to his activities and conversations not observable or audible beyond the boundaries of his own property." *Id.* at 615-16.

In *United States* v. *Berkshire Beagle Club,* Slip Op. M.B.D. No. 80-24-F (D. Mass., August 5, 1981), a federal agent trespassed onto the fenced and posted 200 acre tract of the Berkshire Beagle Club and seized several traps used to capture migatory birds such as the Great Horned Owl. The tract of land was "surrounded by a 1¼" wire mesh fence approximately five feet high. The fence is posted with 'No Trespassing' signs." The agent "gained access to the premises by opening an apparently unlocked gate."

The leg-hold traps were not in plain view. The agent had to enter the defendant's property to observe the traps. The government argued that the warrantless search was proper under the open fields doctrine. The court disagreed, holding the search violated the Fourth Amendment.

In *United States* v. *FMC Corporation*, 428 F. Supp. 615 (W.D. N.Y. 1977), *aff'd*, 572 F. 2d 902 (2d Cir. 1978), the court held that warrantless searches conducted by state officials on the grounds of a manufacturing plant did not fall within the "open fields" exception to the Fourth Amendment.

> "Defendant's Middleport plant includes a completely fenced-in facility of approximately 100 acres and a seperately fenced lagoon of approximately 10 acres. The fence around the lagoon is 8 feet high, topped with barbed wire. Access to the lagoon through the fence is at a main gate which is approximately 150 feet from the fence of the main plant across the public utility easement. There is one other small gate used in connection with pond drainage. According to the affidavit of William C. Cole, Jr., the plant manager, it is defendant's practice to keep both gates closed and locked except when plant personnel are in the lagoon area. This court finds that the highly restricted access to the lagoon and the manner in which it was enclosed do not permit application of the 'open fields' exception in this case." 428 F. Supp. at 618.

In *State* v. *Byers*, 359 So. 2d 84 (La. Sup. Ct. 1978) the court held that the open fields doctrine was inapplicable where the marijuana plants were being cultivated in an area not exposed or accessible to the public. Police conducted at least two warrantless searches of private 640 acre tract of land to observe a plot of growing marijuana. None of the marijuana plants were visible from the public road or

from outside the property. "The property was posted with signs. These signs bore such announcements as: "PRIVATE ROAD; DO NOT ENTER"; "POSTED NO HUNTING, FISHING, TRESPASSING"; "POSTED NO HUNTING." In addition to these signs, the trial judge found that one of the defendants had "posted signs along one of the logging roads leading from the public road into the property and erected two posts set in concrete and connected with a chain in an effort to deny access to the general public." *Id.* at 85. The court held:

> "In the present case, the marijuana was not visible from the public road. The posted signs announced that the logging road was private and prohibited entry of the land. A chain barred access to the private road, though it was down at the time of the arrest and seizure. We conclude, under these circumstances, the defendants had a legitimate expectation of privacy." *Id.* at 86.

In *State of Florida* v. *Brady*, 406 So. 2d 1093 (Fla. Sup. Ct. 1981), the court held that observations conducted on private property were not encompassed within the open fields exception where police were required to cross and cut posted fences to gain access to a location where the contraband could be seen. Police observed the arrival and unloading of a large amount of marijuana from an airplane which landed on a secluded farm. However, to position themselves to make these observations the police officers crossed a dike, rammed through a gate, cut the chain lock on another gate, cut or crossed posted fences, and proceeded several hundred feet to their observation posts. The court held that the warrantless search violated the Fourth Amendment.

> "Although the *Hester* opinion has not been overruled, subsequent opinions indicate that the open fields doc-

trine cannot be used as carte blanche for a warrantless search simply because the location searched is not part of a dwelling or its adjacent curtilage. As the Court has later observed in its opinion in *Katz* v. *United States*, 389 U. S. 347 (1967) '. . . the Fourth Amendment protects people not places.' Our opinion in *Norman* v. *State*, 379 So. 2d 643 (Fla. Sup. Ct. 1980) made it clear that fences and locked gates are evidence of the owners or possessor's expectation of privacy."

III. THE WARRANTLESS SEARCH OF THE OLIVER FARM

The privacy interests protected by the Fourth Amendment are jealously guarded. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). *See e.g., Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 528-29 (1967); *Coolidge* v. *New Hampshire*, 403 U. S., 454-55 (1971). The burden rests on the Government to establish that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *See Camara*, 387 U. S. at 454-55; *Wilson* v. *Health Hospital*, 620 F. 2d 1201, 1208 (7th Cir. 1980).

In the instant case Kentucky State Police officers conducted a warrantless search of the Oliver farm and discovered marijuana under cultivation. The Government seeks to introduce evidence gathered as a result of the warrantless search on the ground that the search was conducted within the Open Fields exception to the Fourth Amendment. The Government argues that the Open Fields Doctrine is a per se rule that Fourth Amendment protec-

tions do not extend beyond the curtilage. At the suppression hearing the district court disagreed and ruled that the search was not within the open fields exception. On appeal a three judge panel of this court affirmed the district court. *See United States* v. *Oliver*, 657 F. 2d 85. En banc consideration of this case was granted to enable the full court to consider the issue. We disagree with the majority and would hold that the warrantless search conducted on the Oliver farm does not fall within the Open Fields Doctrine established in *Hester*, 265 U. S. at 59, and more recently applied in *Western Alfalfa*, 416 U. S. at 865.

The essence of the Open Fields Doctrine, as was explained earlier, is that government agents without a warrant are in the same position as the public and may make observations from locations where the public is not excluded. The Open Fields Doctrine enables government agents to trespass onto private areas from which the public is not excluded and make observations. *See Hester*, 265 U. S. at 58-59; *Western Alfalfa*, 416 U. S. at 865.

The narrow, threshold question before the court is simply whether the public is excluded from the Oliver farm. The government concedes that the marijuana under cultivation was not visible from neighboring properties or from any point of public access. In applying the Open Fields Doctrine courts have been acutely sensitive to attempts to exclude the public. In fact, the presence or absence of fences, gates to impede access, and signs which convey warning such as "No Trespassing" have consistently been a determinate of whether the warrantless search was within the Open Fields Doctrine. *See e.g.*, *Miller*, 589 F. 2d 1134 (within exception where not fenced or posted); *Patler*, 503 F. 2d 472 (within exception where land not posted); *Lace*, Slip. Op. No. 81-1098 (within exception where not posted and freely used by hunters); *Balsamo*, 468 F. Supp. 1363 (within exception where not fenced or posted); *Heer*, 406

F. Supp. 609 (outside exception where posted and fenced); *Berkshire Beagle Club*, Slip Op. M.B.D. No. 80-24-F (outside exception where fenced and posted); *FMC Corporation*, 428 F. Supp. 615 (outside exception where high fence topped with barbed wire); *Byers*, 359 So. 2d 84 (outside exception where posted and chain gate across road); *Brady*, 406 So. 2d 1093 (outside exception where fenced and posted).

In the instant case Oliver's private gravel road was posted. A locked metal gate blocked all vehicle access to most portions of the farm. Although a path did lead around the gate, the gate was posted to ensure that the public went no further. Finally, Hadley and Antle were effectively told to leave the property. The officers were apparently mistaken for hunters. They were told "No Hunting, Come Back Up Here!" This was adequate notice to leave the Oliver farm. We hold that the public was provided with more than adequate notice that they were not to trespass on the Oliver farm. The warrantless search conducted by Hadley and Antle was not limited to areas of public access. Therefore, the search was not within the narrow confines of the Open Fields Doctrine.

It is not necessary to totally exclude everyone from a given parcel of land before the Open Fields Doctrine is inapplicable. It is enough that a reasonable effort has been made to exclude the public. *See Berkshire Beagle Club*, Slip Op. M.B.D. No. 80-24-F (agent gained access to fenced parcel through closed, but unlocked gate); *Byers*, 359 S. 2d 84 (chain gate which normally barred access to the private road was down at time of search and seizure); *Heer*, 406 F. Supp. 609 (agents climbed over posted barbed wire fence).

The second question the court must address is whether the warrantless search violated Oliver's reasonable expectation of privacy. A reasonable expectation of privacy, by

definition, is related to time, place and circumstance. *See United States* v. *Vicknair*, 610 F. 2d 372, 380 (5th Cir. 1980); *Ramapuram*, 632 F. 2d at 1154. The test, as noted, is: 1) whether the individual has by his conduct, has "exhibited an actual (subjective) expectation of privacy"; and 2) whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable." *Katz*, 389 U. S. at 351 (Harlan concurring); *Rakas* v. *Illinois*, 439 U. S. 128, 143-44 (1978).

The district court carefully considered the circumstances of the warrantless search of the Oliver farm and held: "Short of posting guards at the entrance, it is difficult to see what else the defendant could have done to assert his privacy interest in this property." We agree. The officers encountered and ignored visual ("No Trespassing" signs), physical (fences and a locked metal gate) and verbal (verbal warning to leave the property) manifestations that Oliver expected privacy. The marijuana was not visible from any point of public access. Consequently, it cannot be doubted that Oliver possessed a subjective expectation of privacy in his farm land.

In *United States* v. *Oliver*, 657 F. 2d 85 (6th Cir. 1981), the panel held that society will accept objective expectations which: 1) are "normally shared by people in that setting"; and 2) "fall within the limits of what society can accept given its interest in law enforcement." *Id.* at 87. We agree. Oliver's expectation of privacy was objectively reasonable. Individuals in similar circumstances would also expect privacy. More importantly, this expectation of privacy would not unduly hamper society's interest in law enforcement. Oliver did not have a reasonable expectation of privacy from planes or helicopters flying overhead. Thus, the officers could have lawfully used airplanes or helicopters to observe the marijuana from the air. *See e.g.*, *United States* v. *Allen*, 633 F. 2d 1282, 1289-90 (9th Cir.

1980); *United States* v. *Mullinex*, 508 F. Supp. 512 (E.D. Ky. 1980); *United States* v. *DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980); *State of Hawaii* v. *Stachler*, 570 P. 2d 1323 (Hawaii Sup. Ct. 1977). *Accord People* v. *Sneed*, 32 Cal. App. 3d 535 (1973) (Fourth Amendment violated by helicopter observation 20 to 25 feet from ground). *Cf. United States* v. *Lee*, 274 U. S. 559 (1927). Observing the fields from the air is a reasonable alternative to warrantless ground searches. The Kentucky State Police recognized this and began using aircraft to observe suspected marijuana fields a short time after Oliver's farm was searched. We hold that Oliver's expectation of privacy was one which society is prepared to accept.

The government argues that the Olmstead Open Fields Doctrine has continuing validity today. We disagree. The Open Fields Doctrine is not a per se rule which justifies all warrantless searches outside the curtilage of a house. The personal freedoms and privacy which all Americans hold dear would be seriously eroded if we approved a carte blanche rule allowing police officers to barnstorm around private property whenever they received an "anonymous tip" that illegal activities were being conducted on the land. Virtually every court which has considered the issue has held that the Open Fields Doctrine is not a per se rule sanctioning all warrantless searches outside the curtilage. *See e.g., Wilson*, 620 F. 2d 1201 (7th Cir. 1980); *Miller*, 589 F. 2d 1134; *Patler*, 503 F. 2d 472; *Lace*, Slip. Op. No. 81-1098; *Western Alfalfa*, 416 U. S. 861; *Edmonds*, 611 F. 2d 1386; *Patterson*, 638 F. 2d 144; *Pruitt*, 464 F. 2d 494; *Freie*, 545 F. 2d 1217; *United States* v. *Jackson*, 588 F. 2d 1046, 1053 n.12 (5th Cir. 1979); *Ramapuram*, 632 F. 2d 1149; *Van Dyke*, 643 F. 2d 992; *DeBacker*, 493 F. Supp. 1078; *United States* v. *Noe*, 494 F. Supp. 1032 (E.D. Ky. 1980); *Balsamo*, 468 F. Supp. 1363; *Heer*, 406 F. Supp. 609; *Berkshire Beagle Club*, Slip Op. M.B.D. No. 80-24-F; *FMC*

Corporation, 428 F. Supp. 615; *Byers*, 359 So. 2d 84; *Brady*, 406 So. 2d 1093; *State of Nebraska* v. *Camper*, 209 Neb. 376, 307 N. W. 2d 820 (Neb. Sup. Ct. 1981); *State of Tennessee* v. *Lakin*, 588 S. W. 2d 544 (Tenn. Sup. Ct. 1979); *State* v. *Stanton*, 490 P. 2d 1274 (Or. App. 1971); *State of New Mexico* v. *Chort*, 91 N. M. 584, 577 P. 2d 892 (N.M. App. 1978); *People of Colorado* v. *McClaugherty*, 566 P. 2d 361 (Colo. Sup. Ct. 1977); *State of Iowa* v. *Bakker*, 262 N. W. 2d 538 (Iowa Sup. Ct. 1977); *State of Hawaii* v. *Stachler*, 570 P. 2d 1323 (Hawaii Sup. Ct. 1977); *Phelan* v. *The Superior Court of Mariposh County*, 90 C. A. 3d 1005 (Cal. App. 1979); *People of the State of Illinois* v. *Dasenbrock*, 96 Ill. App. 3d 625 (Ill. App. 1981); *Gaylord* v. *State of Arkansas*, 613 S. W. 2d 409 (Ark. App. 1981); *Giddens* v. *State of Georgia*, 156 Ga. App. 258, 274 S. E. 2d 595 (Ga. App. 1980), *cert. denied*, 101 S. Ct. 1733 (1981).

We conclude that the Open Fields Doctrine does not apply in this case. Oliver had a subjective and reasonable expectation of privacy concerning his farm. Accordingly, the warrantless search of his farm violated the Fourth Amendment.

LIVELY, Circuit Judge, dissenting.

I am pleased to join in Judge Keith's excellent analysis of the development of Fourth Amendment jurisprudence in the years since *Hester* was decided. However, I am writing separately because I also disagree with the majority on the basic question of whether the marijuana in the present case was found in an "open field" at all. There is no definition of "open fields" in *Hester*. The sketchy statement of facts in the *Hester* opinion does not mention locked gates or even fences, and there is no indication that the property was posted with "No Trespassing" signs. Most importantly, there is nothing in *Hester* which tells us whether

the field which was searched was visible from a public road or other place where the officers had a right to be. It is undisputed that the Oliver field in question could not be seen from any surface location from which the public was not excluded. I read Justice Douglas' opinion for a unanimous Supreme Court in *Air Pollution Variance Board* v. *Western Alfalfa*, 416 U. S. 861, 865 (1974), as turning on this fact: "The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded."

The evidence in the present case makes it clear that the public was excluded from the premises where the officers first viewed the field of marijuana. I find it surprising that the majority overlooks recent refinements of the "open fields" doctrine and is willing to rely so totally on a factbare opinion from the Prohibition Era, a period not known for requiring law enforcement officers to act with scrupulous regard for the constitutional rights of suspects.

In short, I believe Ray Oliver had done everything possible to establish his claim to a right of privacy in the back field of his farm. Because of his efforts to exclude uninvited visitors, and the location of the field, his claim of privacy was reasonable. The police would not have been frustrated by the requirement of a search warrant in this case. If their information from the informant was not sufficient to establish probable cause, as Judge Keith has pointed out, the Kentucky State Police could have observed and photographed the Oliver field from the air and included information thus gained in their affidavit for a warrant. There was no danger that the evidence would be lost by any delay incident to obtaining a warrant.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-5437

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

RAY E. OLIVER, a/k/a Edward Ray Oliver, - - - - - - *Defendant-Appellee.*

JUDGMENT—Filed May 5, 1982

BEFORE: EDWARDS, Chief Judge; LIVELY, ENGEL, KEITH, MERRITT, BROWN, KENNEDY, MARTIN and JONES, Circuit Judges, sitting En Banc.

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

No costs taxed.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, Clerk

Issued as Mandate: May 27, 1982

Office-Supreme Court, U.S.
FILED
MAR 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 2, 1982
CERTIORARI GRANTED JANUARY 24, 1983

WESTERFIELD-SCHUTZ CO., 610 W. KENTUCKY—P.O. BOX 3001, LOUISVILLE, KY.

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NOTE

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the United States District Court for the Western District of Kentucky, suppressing evidence, dated November 14, 1980 .....Pet. App. 19

Memorandum Opinion of the United States District Court for the Western District of Kentucky, dated November 14, 1980 .....Pet. App. 21

Opinion of the United States Court of Appeals for the Sixth Circuit, dated August 7, 1981..Pet. App. 25

Opinion of the United States Court of Appeals for the Sixth Circuit, En Banc, dated May 5, 1982 .....Pet. App. 31

Judgment of the United States Court of Appeals for the Sixth Circuit, En Banc, entered May 5, 1982 .....Pet. App. 67

RELEVANT DOCKET ENTRIES

Date Filed	Entry
8/21/80	Complaint signed
8/22/80	Warrant issued
9/ 3/80	Indictment returned
11/ 3/80	Motion to Suppress
11/ 5/80	United States ordered to respond to Motion
11/13/80	Suppression Hearing
11/13/80	Response to Motion to Suppress
11/14/80	Motion to Suppress sustained; United States District Court for the Western District of Kentucky
11/19/80	Memorandum Opinion
11/20/80	Notice of Appeal by United States
8/ 7/81	Opinion of United States Court of Appeals for the Sixth Circuit, affirming
8/29/81	United States Petition for Rehearing En Banc
1/ 7/82	Petition for Rehearing granted
5/ 5/82	Opinion of United States Court of Appeals for the Sixth Circuit En Banc, reversing
5/ 5/82	Judgment of Court of Appeals
7/ 2/82	Petition for a Writ of Certiorari
8/ 5/82	United States Memorandum in Opposition
8/25/82	Reply to Memorandum in Opposition
9/17/82	Court orders United States to respond
10/20/82	United States Supplemental Memorandum in Opposition
11/15/82	Reply to Supplemental Memorandum in Opposition
1/24/83	Certiorari granted

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CR 80-00005 BG

THE UNITED STATES OF AMERICA, - - - *Plaintiff,*

v.

RAY E. OLIVER, - - - - - - - *Defendant.*

TRANSCRIPT OF SUPPRESSION HEARING

At a session of said Court held in the Federal Courthouse in Bowling Green, Kentucky, on November 13, 1980.

Presiding: The Honorable Edward H. Johnstone
United States District Judge

Appearances:

For the United States: The Hon. Scott Wendelsdorf
Assistant United States Attorney

For the Defendant: The Hon. Robert L. Wilson
and
The Hon. David Smith

Reported By: James A. Joplin
Official Court Reporter
3213 Kentucky Avenue
Paducah, Kentucky 42001

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Bowling Green, Kentucky
November 13, 1980—10:40 A.M.

PROCEEDINGS

The Court: Call your first witness.
Mr. Wendelsdorf: I call Detective Ben Hadley.

BEN HADLEY being first duly sworn by the Court was examined and testified upon his oath as indicated as follows:

Direct Examination by Mr. Wendelsdorf

The Court: The purpose of this hearing will be to consider both the motion to suppress statements and the motion of the Defendant to suppress the evidence.

Q. State your name for the Court, please.
A. Detective Ben Hadley.
Q. And by whom are you employed?
A. Kentucky State Police.
Q. In what capacity?
A. Narcotics Agent.
Q. How long have you been with the Kentucky State Police?
A. A little over eight years.
Q. And with the narcotics division?

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A. Approximately seven years.
Q. And where are you assigned?
A. I was assigned to work Columbia Post as resident agent.
Q. Now, on or about the 18th day of July of this year, did you receive an anonymous tip that there was Marijuana growing on the Ray Oliver farm?

A. Yes, sir, I did.

Q. Do you know who gave you that tip?

A. No, sir, I don't. It was an anonymous phone call which came in the post.

Q. Had you received only one tip that Mr. Oliver was growing Marijuana?

A. No, sir. I had heard people in the community. They more or less said that there must be something going on and so forth, that, you know, it didn't look right down on Ray's farm.

Q. Now, based on that information, did you decide to go to Mr. Oliver's farm on or about the 18th day of July, 1980?

A. Yes, sir, I did.

Q. Would you tell the Court first of all, who went with you? Were you by yourself?

A. No, sir, Detective Jimmy Antle was with me.

Q. Is he with the Kentucky State Police?

[4]

A. Yes, he is.

Q. Tell the Court what you did and what, if anything, the Defendant said to you when you went to his farm on the 18th day of July, 1980?

A. On the 18th, it was around two o'clock when Detective Antle and myself arrived at the farm. We drove as the road goes through the farm, you come to a gate which at this time I backed up, and there is an oil tank sitting on the right just before you get to the gate at Mr. Oliver's barn. We parked the car there, walked down the road, down to the barn. At that point there was a camper set up in front of the barn. There wasn't anyone around that we could see, so we just walked on down the road, which makes a circle and comes back up on the back side of the farm, and when we got to the back side of the farm there was a gentleman standing in front of the camper

who had started hollering at us to come back, that there was no hunting allowed, and to come back to the camper. At this point we turned around and started back to the camper when he yelled. We couldn't see anybody around the camper when we got back up there. At that point we thought they might not know who we were. We didn't have guns. I hollered out when he hollered at us that we were State Police and

[5]

no one came up, and I walked over to the camper and looked in the door, and didn't see anyone. I closed the door and went on down to where we originally started. When we got on the lower part of the farm we saw a Marijuana field. We came back to the camper and hollered a few more times. I went back and looked in the camper and it was locked at this time. We got in the car, and I started back to Crealsboro, and I met Mr. Oliver.

The Court: Was it a public road that you took to get to the Oliver farm?

A. It's the Swann Pond Bottom Road is all I know.

The Court: It is a public thoroughfare?

A. Yes, sir.

The Court: How do you spell it?

A. Well, it's the Rockhouse Bottom Road or Swann Pond.

Q. I think we can stipulate it was a public thoroughfare.

Mr. Wilson: It was the Rockhouse Bottom Road.

Q. But it was a public road?

A. Yes.

Q. And it turned to what?

A. The Sugar Camp Road.

Q. Is that a public road?

[6]

A. Yes.

Q. From this road, did you turn onto his property?

A. This road as you turn off the Rockhouse Bottom Road onto the Sugar Camp Road, it dead-ends at his farm.

Q. This is a public road which actually enters upon Mr. Oliver's property?

A. Yes, sir.

Q. Now, did you go by his house, his living area?

A. Yes, sir.

Q. Alright, how far away from the house was this barn and camper that you are talking about?

A. I'd say approximately three-quarters of a mile.

Q. Alright, did you go in the barn?

A. No, sir.

Q. Was there a fence around the camper or the barn?

A. There was a gate before you get to the barn.

Q. Alright, do you mean just blocking the road?

A. Yes, sir.

Q. Alright, now, how far then would you say the Marijuana field that you discovered was from the house, the living area on the Oliver farm?

A. I'd say from Mr. Oliver's house to the Marijuana field going the roadway would be about a mile.

Q. And how far from the barn and the camper?

A. There was just, you have to go down and around to

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come back up to the Marijuana field, but if you went straight across the field, it would be about a quarter of a mile, I'd say, if that far.

Q. Now, you say when you returned to the house you met Mr. Oliver?

A. As we was coming back out of Crealsboro, we had left his house. There wasn't no one at his house.

Q. You were back on the public road at this time?

A. Yes, sir.

Q. How was he going, moving or walking?

A. He was driving. I turned and was going to follow him back to his house, but before he got to his house he turned off into a small gravel driveway, and I pulled in behind him.

Q. What kind of vehicle were you in?

A. A black Firebird.

Q. It wasn't a State Police Vehicle?

A. No, sir. Well, it's a State Police vehicle, but not marked.

Q. What happened?

A. When I pulled up behind him I got out and started to walk up. Mr. Oliver opened the door and kind of leaned around and said, Hello, Mr. Hadley. I know what you are looking for. Just go on down there. He said, I've got to take some drinks to a

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neighbor's house, some Cokes or milk or something, and I will meet you. I told him I would meet him at the gate, which is on down past his house.

Q. Now, had you asked him anything prior to his statement to you?

A. No, sir. I didn't identify myself to him. As I was walking up to the car he turned around and said, Mr. Hadley, I know what you are looking for and I will show you where it's at.

Q. He knew who you were?

A. Yes, sir.

Q. He said he knew what you were looking for and he would meet you at the house?

A. Yes, sir.

Q. Is that what you did?

A. I told him I would meet him at the gate, and he said he would be on down there. So, me and Detective Antle went on down and in about fifteen minutes Mr. Oliver drove up, and he says, Boys, leave your car there and get

in the car with me and I will show you where it's at.

Q. The second statement was leave your car here and get in my car. Was this in response to any question you had asked or any statement by you at all?

A. No, sir.

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Q. Did he have any difficulty hearing you?

A. Yes, sir.

Q. Had you known Mr. Oliver had a hearing problem prior to this time?

A. I had never talked to Mr. Oliver, but in the process of talking to him I could tell that he had a hearing problem, yes, sir.

Q. Did you compensate for his apparent difficulty in hearing you?

A. Yes, sir, I raised my voice to where he understood what I was saying.

Q. How close were you standing to him?

A. We were face to face, you know, just right together.

Q. And you did raise your voice?

A. Yes, sir.

Q. Now, when you were having these conversations, were his answers to you germane to your questions? Did they appear to be responsive to your questions?

A. Yes, sir, they were.

Q. Was it your opinion that he understood what you were asking him?

A. Yes, sir.

Mr. Wilson: Objection as to what he understood. It is irrelevant.

Mr. Wendelsdorf: Well, it is

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very relevant, the purpose.

The Court: I will overrule. We are not bound by the Federal Rules in the suppression hearing. That goes both ways.

Q. So then you got into Mr. Oliver's car?

A. No, sir.

Q. What happened?

A. At this particular time he said to get in his car and leave mine there, and he would show us where it's at. I advised Mr. Oliver, I already know where it's at. I have done seen it, and there is no use, you know. I said, what we need to do now is try to figure out some way to get it destroyed, and I also asked him, let's see, I asked him who was tending it.

Q. Now, at this time or prior to this time, did you advise Mr. Oliver of his Constitutional rights?

A. Yes, sir, I did.

Q. When was that?

A. That was as soon as I told him that I knew where it was at, and you know, that I didn't need to go down and look at it, that I already knew where it was at.

Q. Exactly what rights did you advise him of?

A. I told him that he was under arrest for cultivating Marijuana, and that he had a right to remain silent, anything he said could and would be used against him

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in a court of law, that if he needed an attorney and could not afford one, one would be appointed for him by the courts.

Q. Alright now, how did you convey these rights to him?

A. Orally, in that order.

Q. Did you give him anything in writing?

A. No, sir. I asked him . . .

Q. When you say you gave it to him orally, again, how did you speak, in a normal conversational tone of voice?

A. No, sir. I asked him each time when I got through, I asked him, do you understand your rights? Ray said, Yes, I do.

Q. Alright, to each one of these rights?

A. Yes, sir.

Q. Now, following you giving him his rights, what did he say and do from that point on?

A. He started, I started asking him about who was tending or taking care of the Marijuana. I asked him was it his corn. He said, No, I've got it leased. I asked him who it was leased to. He said he didn't know, that it was two guys from Taylor County, that he thought they were from Taylor County. I asked him did he have a written lease, and he said no, that

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it was just an oral agreement.

Q. What did he say about the trailer?

A. I asked him who the camper belongs to. He said, It belongs to the people taking care of the corn, that they moved it in approximately two months prior to this.

Q. And he advised you that he had an oral lease with these individuals?

A. Yes, sir, he did.

Q. Now, go on. What else did he say? Your questions to him and his answers to you.

A. I asked him about who the guys were. He said that he didn't know. I asked him how did they contact him. He said that he was in a restaurant in Russell Springs. They approached him, and that they just wanted to lease it, and he leased it to them. I kept trying to find out who it belonged to and so forth like that, which he said he did not know, and then we started, I asked him did he have any way of destroying the Marijuana. He said that he would

get his neighbor's tractor to come up and destroy it, that he would pay him to do it, and while we were standing there talking and waiting for the tractor to get there Ray asked me, he said, Mr. Hadley, would I be losing a hundred thousand dollars here? I said, Ray,

[13]

I don't know. I have no idea, you know. I said, it depends on what kind of market you can get for it, and so forth. I asked him, Mr. Oliver, if you don't know who is growing this, how were you planning to get your money when they harvested it? He said, I would have got my money. I said, in my opinion if you have leased this land to people you don't know, you would have not found them. He said, You would have found their bodies floating in the river.

Q. Did Mr. Oliver ask you how you found out about it?

A. Yes, sir, and he emphasized that he knew who did it, and that it would be very easy for them to have a hunting accident.

Q. Now, where were you when this conversation took place?

A. We were down about the barn.

Q. Now, about the lease, whether or not he was going to lose a hundred thousand dollars from this, where did that conversation take place?

A. We were standing at the barn.

Q. Now, did you proceed to the Marijuana field then?

A. Yes, sir, when the tractor got there. They brought two tractors, one with a disc, and one with a bushhog. Mr. Oliver left shortly after that to go drive one of the tractors up.

Q. Were you aware of a second Marijuana field on the

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Oliver farm?

A. No, sir, I wasn't.

Q. How did you become aware of it?

A. When a gentleman arrived with the tractor he said, which field is it, and he called a certain field, and Ray said no, no, it's in the other one. So we went to that field. We destroyed that field, and then I turned around to Mr. Oliver. I asked Mr. Oliver, what about the other field? I said, is there any Marijuana in it? He said, well, I guess we'd better go look. I said, Well, are there any use in bringing both tractors or anything? He said, Yeah, you had better bring them. At that time he showed us how to get to the other field, and over to where the Marijuana was, and he showed it to us.

Q. Answer the Defense's questions, if you would.

Cross-examination by Mr. Wilson

Q. Mr. Hadley, when you saw Ray Oliver on the road, the public highway leading down to his house, what was your intentions at that time as an officer?

A. To stop him.

Q. You were at that time intending to restrict his movement then? You were in charge of what he was going to do after that?

A. I was going to stop him and talk to him.

[15]

Q. I understood you to say a moment ago you wanted to follow him to his home.

A. I figured that's where he was going, because I didn't have a blue light, so I was going to follow him where he was going.

Q. Was Ray Oliver free at that time to go to Russell Springs or anywhere he wanted to?

A. There wasn't anything said about that.

Q. If he told you, I am going to Jamestown, or I am going to Louisville for a couple of weeks, what would you have done?

A. I don't know.

Q. Was he restricted in your mind at that time, or under your control?

Mr. Wendelsdorf: Objection. The restriction has to be in the mind of the Defendant, not the police officers.

The Court: Overruled.

Q. You had him there to stop him?

A. I was going to question him about the Marijuana field, yes, sir.

Q. You stopped him on the road for the purpose of questioning him about the Marijuana?

A. Yes, sir.

Q. Which you had already seen?

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A. Yes, sir.

Q. Now, for the record, did you ever obtain any search warrant to search this property?

A. No, sir.

Q. Did you ever obtain a warrant for the arrest of Mr. Oliver prior to arresting him?

A. I issued him a citation at the barn.

Q. Did you take him into custody?

A. Later on that day, after we got the Marijuana destroyed, yes, sir.

Q. From the time you stopped him on the road, did you ever let him outside your custody? Was he always within your reach at that time until you took him to jail?

A. Repeat the question.

Q. Did he ever leave your presence during this time, after you stopped him on the road, until the time you took him to jail?

A. When I stopped him on the road he went on up to wherever he was going to deliver the drinks for his neighbor and I went on down to the barn and waited for him to come on down there. When he came down after we had talked a while, he left to go get a tractor.

Q. Okay, from that point and time he met you at the gate

[17]

and the time you took him to the jail, did he ever leave the custody of you or Mr. Antle?

A. After he returned with the tractor?

Q. Did you have him in your custody?

A. Well, we were destroying the Marijuana, and they were there, yes, sir.

Q. And that took place at his property?

A. Yes, sir.

Q. Now, when you stopped on the road, did he say he knew . . . I understood you to say he said, I know what you are looking for. I will meet you down at the house. Did he say what that was?

A. No, sir.

Q. He didn't say anything about Marijuana or anything?

A. No, sir.

Q. Now, did he sign any waiver of his rights?

A. No, sir.

Q. Did he sign any confession?

A. No, sir.

Q. Did he sign any written statement whatsoever?

A. He was not asked to.

Q. The only admissions then you have are oral admissions?

A. Yes, sir.

Q. Now, when the hundred thousand dollars was mentioned, who else was present down there at the farm then?

[18]

A. Detective Antle.

Q. Was David Davenport, the local newspaper editor, there?

A. Not at this time, no, sir.

Q. Had you sent for him?

A. No, sir, I did not send for him.

Q. Who did send for him?

A. I don't know if, evidently when I called the post to request for a unit to come down there, I think Detective Antle or, I don't really remember who asked for the newspapers to come down. I may have. I don't know.

Q. Did you give a statement to Mr. Davenport or anybody about what you valued the crop at?

A. I may have gave a rough estimate.

Q. And that was four hundred thousand dollars?

A. I usually figure a rough estimate of fifty thousand dollars an acre.

Q. And this talk you had with Mr. Oliver, that was more in jest than anything, was it not? You all were talking back and forth?

A. We were just having a general discussion.

Q. And he laughed during this period of time when he was talking about that, didn't he?

A. He laughed all the time we was there.

[19]

Q. He never did take this very seriously down there, did he?

A. No, sir.

Q. And many of his questions you said you asked him whether or not he understood his rights, and he merely said, yes?

A. He said yes, I know what you are saying, Mr. Hadley.

Q. Did he repeat those rights back to you, or say anything about getting an attorney?

A. No, sir, I don't think so.

Q. But his mood was a jovial laughing type mood down there?

A. Yes, sir, until we started destroying the Marijuana.

Q. Now, this gate, let's go to the gravel road you referred to. You referred to it as a public road. Do you know that of your knowledge?

A. It has a county road sign on it.

Q. I am talking about the gravel road.

A. The gravel road has a county road sign, Sugar Camp Road sign on it.

Q. It doesn't have a road that says this is a county road, does it?

A. It's . . .

Q. It just has a marker that says Sugar Camp Road, doesn't it?

[20]

A. Yes, sir.

Q. And again, I ask you, to your knowledge, is that a public or private road?

A. To my knowledge, it's a public road.

Q. Other than that sign being there, do you know that?

A. Other than it being a gravel road and maintained by the County, or State, or whatever.

Q. Well, do you know that it is maintained by the county when the facts will show that Mr. Oliver furnishes the gravel for that road? You wouldn't know that of your knowledge, would you?

A. No, sir.

Q. Now, as you go down to Mr. Oliver's house you leave any semblance of a public road, don't you, to get to the barn where the camper is?

A. It's just the farther you go the smaller the road gets.

Q. That's not a public road, is it?

A. I don't know. The way I understand it, years ago it used to be a public.

Q. I am asking you what you know, not what you you understand. You, yourself knew it wasn't a public

road, didn't you? You knew you were on Mr. Oliver's property, didn't you?

A Yes, sir, I did.

[21]

Q. And you knew you were there without a warrant?

A. Yes, sir.

Q. And you said you came to a gate before you got down to this trailer?

A. Camper.

Q. Camper. Was there a lock on that gate?

A. I don't remember.

Q. You don't remember seeing a locked gate there across the road?

A. It could have very well been, because I didn't climb over the gate or nothing. There was no fence at one end, and there was a path where people had been walking around the gate, and I just walked around it.

Q. But the road, whatever it was, at that time it was a narrow farm road and there was a locked fence or a gate?

A. Possibly so. I know the gate was there.

Q. And the property was posted, was it not?

A. Yes, sir.

Q. And you went on beyond the posted signs into this property?

A. Yes, sir.

Q. Now, where did you first observe the Marijuana? Where were you standing when your first saw it yourself?

[22]

A. I was standing right at the Marijuana field.

Q. Could you see the Marijuana field from the truck camper?

A. Yes, sir.

Q. Could you see it from the locked gate?

A. You could see the field. You could not stand there and identify that that was Marijuana over there, no, sir.

Q. So at the locked gate at that time you couldn't see any contraband on Mr. Oliver's property?

A. True.

Q. Now, after the Marijuana was destroyed or at any time, did you make a more thorough investigation of this camper that was there?

A. Not until after the Marijuana was destroyed. Mr. Oliver advised that it did not belong to him. It belonged to the people that was raising the Marijuana.

Q. I am asking you if you made an investigation of what was in the camper. Did you go in there?

A. Yes, sir, after we got the Marijuana destroyed.

Q. What did you find in there?

A. In reference to what?

Q. Articles. Did you find beer there?

A. There was beer sitting on the outside in a cooler,

[23]

yes, sir.

Q. And iced down?

A. Yeah.

Q. And ice on it?

A. Yes.

Q. And did you find a refrigerator there?

A. No, sir. Yeah, but it wasn't plugged up.

Q. Did you find anything in the refrigerator?

A. No, sir, I don't think so.

Q. Did you look in it? Did you find some eggs and bacon down there somewhere?

A. There was eggs and bacon in the cooler.

Q. Did it appear to be inhabited by someone as a home, or a place to stay?

A. Yes, sir.

Q. What did you do with this home?

A. I confiscated it.

Q. How did you confiscate it?

A. I went down there and got it?

Q. And loaded it on a truck and hauled it off?

A. Yes, sir.

Q. What type of warrant did you have for that?

A. I didn't have any.

Q. What kind of court order did you have for it?

A. I didn't have any.

[24]

Q. What else did you take?

A. I took the coolers. There was a pick-up truck camper top that was there that Mr. Oliver advised that belonged to them, and what camping supplies there was there.

Q. Did you also look in Mr. Oliver's barn there?

A. Look in it?

Q. Did you go inside the barn?

A. No, sir.

Q. Nobody went inside the barn?

A. No, sir. There were hogs in the barn and we didn't go inside the barn, or I didn't.

Q. Now, you say when you asked Mr. Oliver did he have any other fields, he said we had better look and see?

A. I asked him, and he said we had better check on it.

Q. He didn't say anything about any more Marijuana?

A. I asked him should we bring the tractors, and he said, Yeah, we had better bring the tractors.

Q. This other field, is it in the same general area as the first field?

A. There is a strip of woods and a gulley between the two fields which I hadn't even noticed the other field being over there.

Q. Well, describe if you would, Officer, to the Court the topography of the land, what it is bounded by,

[25]

between what farms, a farm belonging to Campbell?

A. I don't know.

Q. On one side it is bounded by the Cumberland River?

A. Yes, sir.

Q. And on one side you had the locked gates and the posted signs. Is that right?

A. Yes, sir.

Q. This tip that you got, Mr. Hadley, do you know who that person was that called?

A. No, sir, I don't.

Q. What information did you receive from that tip?

A. That Mr. Ray Oliver had a large amount of Marijuana growing on his farm, and it was on the Sugar Camp Road, to follow that road.

Q. How long have you been involved in narcotics investigation with the Kentucky State Police?

A. Around seven years.

Q. Are you also involved in that same general area with other fields of Marijuana?

A. Yes, sir.

Q. Do the State Police have available to them airplanes for the surveillance of crops?

A. I have never been able to get one.

Q. Do you not have cases pending in Marion County, Kentucky, where airplanes were actually used for this

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purpose?

A. No, sir.

Q. You don't have any cases pending in the Western District of Kentucky where surveillance was by airplane?

A. No, sir, helicopters.

Q. But you had helicopters available to you?

A. The only way I got the helicopter, I know a guy on the Jefferson County Police. He is a Jefferson County

Policeman, and after we got to getting all of these complaints about the Marijuana, then we started getting the helicopter and was able to use the helicopter.

Q. But you do have a helicopter that is useable and can be used for this?

A. If I am able to borrow it from Jefferson County.

Q. And you can use that helicopter, can you not, to make your surveillance without getting on the property, could you?

A. At the time we went to Mr. Oliver's?

Q. I am asking about now.

A. We do now, but not at that time.

Q. And the Marion County cases were a week or two later?

A. That's right.

Mr. Wilson: That's all.

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Redirect Examination by Mr. Wendelsdorf:

Q. Mr. Hadley, when you initially stopped Mr. Oliver, he indicated to you that he would meet you at the house?

A. Yes, sir.

Q. Then he went off and you don't know where he went?

A. He said he was going to deliver some drinks up to a neighbor's house.

Q. You didn't put a blue light on him or anything when he stopped?

A. No, sir.

Q. He pulled over?

A. Yes, sir.

Q. And he got out of his vehicle?

A. He just opened the door and kind of leaned out.

Q. He acknowledged your identity?

A. Yes, sir.

Q. And said he knew what you were there for?

A. Yes, sir.

Q. And you didn't tell him not to leave his car or not to leave?

A. No, sir.

Q. He did go somewhere, didn't he?

A. Yes, sir.

Q. And when you went to the Marijuana field and he went

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to get a tractor, did he leave?

A. Yes, sir.

Q. He could have gone to Louisville then, couldn't he?

A. Yes, sir.

Q. Was he in your custody then?

A. No, sir.

Q. You said Mr. Oliver was doing a lot of laughing, and Mr. Wilson was good enough to point out that you have been involved in a quite a few Marijuana investigations in this part of the State?

A. Yes, sir.

Q. Do people take growing Marijuana very serious down there in Marion County?

A. No, sir.

Q. Have you been successful down there?

A. No, sir.

Q. The most they get down there is a $250.00 fine, don't they?

A. Yes, sir.

Q. And do you know that the courts just don't take this very seriously down there, do they?

A. True.

Q. And nothing happens to people that grow Marijuana in Russell and Marion Counties?

A. The results I have had have been a joke.

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Q. Was there a fence at that gate?

A. There was a metal gate with two posts on each side. I'd say possibly it did have a lock on it. I don't remember, but there was a path going around the end of it.

Q. The gate merely blocked the road?

A. Yes, sir.

Q. There was no obstruction whatsoever to a person on foot?

A. No, sir.

Mr. Wendelsdorf: Thank you.

Mr. Wilson: May I ask one more question?

The Court: Yes, sir.

Re-cross-examination by Mr. Wilson

Q. One thing I forgot to ask you awhile ago, you say that you saw a person at the barn?

A. Yes, sir.

Q. And this person hollered at you at the barn and said get off the land, no hunting?

A. He said, No hunting is allowed, come back up here.

Q. Okay. Now, at that time you hadn't seen the Marijuana, had you?

A. No, sir.

Q. And at that time, you were ordered off the land?

[30]

A. He didn't say get off, he said there's no hunting allowed. Come back up here.

Q. When Mr. Oliver left the farm, he was to go after a tractor, to come back, was he not?

A. Yes, sir.

Q. And he was doing what you had directed him to do?

A. I did not direct him. I suggested to him, I said, we've got to have some way of destroying it. Do you know of anybody that's got a tractor that we can destroy it with,

and he said, Well, my neighbor down here, and he said, I will go down and get him.

Q. But that specific limited purpose, to go after a tractor, was the only time he was allowed to leave?

A. To get the tractor, was the only time he left.

Mr. Wilson: That's all.

The Court: Mr. Hadley, you say the property was posted. Will you tell me how it was posted?

A. There was a No Trespassing Sign, I think, Your Honor. I don't remember for sure.

The Court: Where was the No Trespassing Sign?

A. It was on the gate.

The Court: On the gate itself?

A. Yes, sir.

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The Court: Were there other signs around the property?

A. That's the only one that I saw.

The Court: Thank you. Anything further?

Mr. Wendelsdorf: No, Your Honor.

The Court: Do you have witnesses?

Mr. Wilson: Yes, Mr. Oliver.

RAY OLIVER 11:16 A.M. being duly sworn by the Clerk of Court, was examined and testified upon his oath as indicated as follows:

Direct Examination by Mr. Wilson:

The Court: Mr. Wilson, has your attorney advised you that the statements made here in this hearing are introduced for restricted purposes? However, they may be used for impeachment and other purposes as provided by the law? Does he understand that, Mr. Wilson?

Mr Wilson: Your Honor, I have not told him that specifically. I told him he doesn't have to testify and we

have talked about him testifying here, and he has chosen to do so.

The Court: Very well, just so he understands. If you are satisfied, the Court is satisfied.

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Mr. Oliver, can you hear me here?

A. Yes, I do.

Q. State your name, please.

A. Edward Ray Oliver.

Q. How old are you, Mr. Oliver?

A. Sixty-one.

Q. Have you been in the courtroom while we have been having this hearing?

A. Been here?

Q. Yes.

A. Yes, I have been sitting over there.

Q. Have you heard what the witnesses have said? Did you understand what Ben Hadley said?

A. Just a word now and then.

Q. Mr. Oliver, do you remember the day you were arrested on July 18th of this year?

A. Yes, I do.

Q. And who arrested you?

A. Ben Hadley.

Q. Was anybody with him?

A. Jimmy Antle.

Q. Where were you at when they arrested you?

A. Well, first I was up there on the road taking a neighbor some stuff, and him and Jimmy Antle was pulled in behind me and stopped me, and he told me

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he had been down to my place and found some stuff, and he asked me where are you going now, and I said I am taking a neighbor some stuff and drinks to his place. He told me so go on and he waited at the church house, and

he came back and he followed me to the house. I let my wife out and took the groceries in. Then I told Hadley and Antle if they wanted to, they could ride up to my place with me, and they said they had done been up there.

Q. How far do you live from the nearest town?

A. Oh, I'd say four-tenths of a mile.

Q. From the nearest town?

A. From the nearest town?

Q. Yes.

A. It's some twenty miles.

Q. And what is that town?

A. Jamestown.

Q. And the next nearest town would be what?

A. Russell Springs.

Q. How far is it to there?

A. Twenty-two.

Q. Now, you live at the bottom of Rockhouse Bottoms. Is that true?

A. That's right.

Q. Now, what type of farming do you do there, Mr. Oliver?

[34]

A. Well, I have not farmed any myself for about twelve or fifteen years.

Q. Do you have any equipment?

A. No, sir, I don't.

Q. Do you have a tractor?

A. No.

Q. Now, when Mr. Hadley was down there, did you know him?

A. Yes, I did.

Q. How did you know him?

A. I have known for a long time.

Q. How far is it to Adair County from where you live?

A. I'd say fourteen miles.

Q. That's to Adair County or Columbia?

A. Adair County line.

Q. And is Mr. Hadley from Adair County?

A. Yes, he is.

Q. So, you knew what he would be down there for as he came down, would you, or would you not?

A. No, I did not know what he wanted.

Q. Now, Mr. Oliver, was that place posted down there?

A. Yes it was.

Q. How was it posted?

A. Well, along my road there it's posted. There's four different signs that are along the road, and then up

[35]

there at the gate there is No Trespassing there, and it is posted.

Q. Is there a fence on part of that property?

A. Like you go up by the road this way on the left, there's a fence from there up around to the woods and joins Cananser.

Q. Is there a fence between you and Cananser?

A. Yes, there is.

Q. Who else do you join there?

A. On the north side would be the river and then Coleman Campbell has a line fence.

Q. Is it fair to say, or is it true that all of your farm is fenced or posted, one or the other, where this Marijuana was found?

A. Yes, I've got a fence around the road down there, and there's a gate that the Pyle boys took down to get through, and then over there at the back of the field they made just a gap there.

Q. You are talking about the Pyle boys. Who is that?

A. Well, they are the ones that's got my bean ground leased.

Q. What type of ground is this, or did you have a lease to this place where the Marijuana was?

A. Yes, I did.

Q. Who was that leased to?

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A. Joe Davis and Jimmy McCullen.

Q. Do you know where they are from?

A. They told me they was from Adair County.

Q. Did you find out they might be from somewhere else?

A. Yes, another fellow was talking to them, and they told him they was from another place.

Q. Where was that?

A. Russell County.

Q. Did anybody say they told them they were from Taylor County?

A. A neighbor lady said they did.

Q. Did you know these people that leased from you?

A. Yes.

Q. Now, have you been able to find them?

A. No, I have not.

Q. But that area they had leased, was that all posted?

A. Yeah.

Q. Now, when Mr. Hadley was down there talking to you, did you understand what he told you?

A. Well, I'm pretty sure I understood most of it.

Q. Now do you have any problem with your hearing?

A. If you don't talk loud, I don't hear it.

Q. Did he tell you you had a right to remain silent and a right to have a lawyer, and you didn't have to say anything?

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A. Today is the first time he said that to me.

Q. Did any officer, after you was arrested, tell you that?

A. As we was coming up 379, David Bunch and Roger Pierce, David told me my rights.

Q. David Bunch is who?

A. State trooper.

Q. When was this that he told you that?

A. In the neighborhood of eight o'clock on the 18th that night.

Q. Was this after Ben Hadley had left?

A. No. They picked me up from the house and Hadley and Jimmy Antle was still up at my place.

Q. Did you give any permission to Ben Hadley to come on your land down there?

A. At no time.

Q. Did you ever tell Ben Hadley that you waived your Constitutional rights and you wanted to make a statement?

A. No, sir.

Q. Did they ever ask you to sign anything, Ray?

A. No, they didn't.

Q. Did you have any talk with them about how much money that Marijuana was worth?

A. At no time.

Q. Were you laughing and joking with him while he was

[38]

down there?

A. Yes. We was laughing up there.

Q. Did you ever tell him that the Marijuana was any part of yours?

A. No, because I had my land leased. I didn't have any part of it.

Q. Now, this gravel road, who puts the gravel on that road that comes up to your house?

A. The County has put some, and I put some, but what caused the gravel road on up there, at one time we had two oil wells pumping up there, and we graveled it,

the men who had the place leased graveled it over to the barn and to the tanks over there.

Q. Over to the back of the farm where the Marijuana was found, is there any road over there?

A. No, no.

Q. How do people get over there?

A. They went down the edge of the field.

Q. Is there car tracks going through there, or a path?

A. A path.

Q. Now, this gate that was down there, was that locked?

A. Yes, it was.

Q. The one that had the No Trespassing sign on it?

A. That's right.

Mr. Wilson: If Your Honor

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please, I have previously shown the Government copies of pictures I want to introduce and I would like to introduce some of those here.

The Court: Very well.

(Whereupon documents were shown to Mr. Wendelsdorf by Mr. Wilson.)

Q. Mr. Oliver, I am going to show you some pictures and see if you can identify them. Is this a picture of the barn on your property?

A. Yes, sir.

Mr. Wilson: I would like to have this marked as Exhibit 1 for identification.

Mr. Wendelsdorf: Your Honor, I have no objection to any of these pictures being admitted.

The Court: Let them all be admitted for the purpose of this hearing.

Q. Ray, I am going to show you Defendant's Exhibit 1. What is this in the right-hand side of the picture?

A. That's the barn.

Q. Is this the barn at your place?

A. That's right.

Q. Now, there appears to be a field over here.

A. That's my corn field.

Q. Now, who had that leased, if anybody?

[40]

A. Joe Davis and Jimmy McCullen.

Q. Was there any Marijuana in this field found by anybody?

A. No, there wasn't.

Q. Now, what's behind the corn field?

A. That's the river over there.

Q. What's between the river and the cornfield there?

A. Timber.

Q. What's behind that timber?

A. Well, on over the bank, the river.

Q. Where was the Marijuana found in relation to this picture?

A. On beyond to the right of that.

Q. Okay. Now, this is Defendant's Exhibit 2. What is that?

A. That's as you go up, that's the front of my barn.

Q. Okay now, where would the Marijuana patch be in that picture?

A. It would be in here to the right.

Q. And there again, what is this on Exhibit 3?

A. That's the back of my barn.

Q. And where would the Marijuana patch be in relation to that?

A. At the very right.

Q. Can you stand at the barn and see the Marijuana?

[41]

A. At no time.

Q. Could you see it from any position?

A. No.

Mr. Wilson: Could I have this marked as Defendant's Exhibit 4?

Q. I will show you one more now, Mr. Oliver. What's that right there? Is that your cornfield down there?

A. This is it right there. That's bushes and things.

Q. Was this taken in your field there?

A. Yeah.

Q. Now, what's this behind the field there in the back of the picture? Is that a row of trees?

A. You can see corn. This is the cornfield here, one cornfield, and then on down here to the right of this is the other cornfield where the Marijuana was.

Q. Where is your barn at now from right here? Is it up in here?

A. It's back this way.

Q. Is it hidden by the trees?

A. Yeah.

Q. So, when you are down there . . .

A. That's right.

Q. When you are standing in the Marijuana field, do the trees hide the barn?

[42]

A. You can't see the barn.

Mr. Wilson: If Your Honor please, that's all the questions I have at this time.

The Court: Very well.

Cross-examination by Mr. Wendelsdorf:

Q. Mr. Oliver, can you hear me alright?

A. Okay.

Q. If you can't, let me know and I will speak louder.

A. Okay.

Q. How far from your house was the field with the Marijuana?

A. About a mile and four-tenths.

Q. Who owned the trailer that was found there by your barn?

A. I own it now, but Jimmy McCullen and Joe Davis did own it, but I had it later.

Q. Alright, and you said that you had leased this property to Mr. McCullen and Mr. Davis?

A. That's right.

Q. And was this a written lease?

A. Yes, it is.

Q. Do you have a copy of that lease with you?

A. Yes.

Q. Does your attorney have it?

A. That's right.

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Mr. Wilson: I furnished that, didn't I?

The Court: Was it furnished in discovery?

Mr. Wendelsdorf: I don't have a copy.

Mr. Wilson: I only have the original.

Mr. Wendelsdorf: Was it in this package here?

Mr. Wilson: According to my cover letter, it was.

Mr. Wendelsdorf: It must have got left out. That's alright.

Q. Well now, your attorney has handed me a piece of paper. Let me show it to you. Now, is this the lease that you are talking about?

A. That's right.

Q. Alright, and this lease is dated April first, 1980?

A. That's right.

Q. And it reads, I, Joe Davis and Jim Culver, leased twenty acres of land from Ray Oliver for six months for the sole purpose of growing corn.

A. That's right.

Q. And it's signed by Joe Davis and Jim Culver?

[44]

A. That's right.

Q. Alright. Now, how much did they lease this land from you for?

A. Eight hundred dollars.

Q. Why wasn't that in the lease?

A. Pardon?

Q. Why didn't you put that in the lease?

A. They didn't put it on there, but that's the way they gave me the lease.

Q. So, this lease came from Mr. Davis and Mr. Culver?

A. That's right.

Q. Now, when Mr. Hadley asked you who the people were who leased the land, you told him you didn't know, didn't you?

A. No, sir.

Q. Did you tell him at that time that Mr. Culver and Mr. Davis were the ones that leased your land?

A. No, sir.

Q. Did he ask you who leased the land?

A. Yes, sir.

Q. What did you tell him?

A. I told him if I could think of their names I would tell him.

Q. And have you ever told him who they were?

A. Yes.

[45]

Q. When?

A. Now.

Q. Before today you didn't tell him who they were though, did you?

A. I told him one's name was Joe. That's all I did tell him.

Q. The point is, you knew who those boys were when Mr. Hadley asked you, didn't you?

A. Pardon?

Q. You knew when he asked you the first time?

A. Did I know when he asked me?

Q. Yes, sir.

A. I sure did.

Q. Why did you tell him you didn't know who they were?

A. I didn't tell him that.

Q. What did you tell him?

A. I said if I could think of their names I would tell him.

Q. But you didn't, did you?

A. No, I didn't.

Q. Now, was this the only piece of your property you leased? Did you lease other parts of your property?

A. Did they lease other parts?

Q. Did other people lease other parts of your property?

A. Yes, sir.

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Q. You don't do any farming yourself?

A. No, I don't.

Q. How many people lease property from you, would you say?

A. There's four.

Q. And do you do any of the work on these fields when you lease them?

A. No, I don't.

Q. Do you go up there and tend them, take a look at them, and check them from time to time?

A. No, sir, I don't.

Q. So in other words, when somebody leases property from you, let's say for six months, for all intents and purposes, that's their land for six months and you don't bother with it. Is that what you are saying? In other

words, Mr. Culver here and Mr. Davis leased this property from you for six months?

A. That's right.

Q. You considered it their land for six months?

A. That's right.

Q. And you didn't go up there and didn't fool with it at all?

A. No, sir.

Q. As far as you were concerned, they might as well have owned the property for six months?

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A. That's right.

Q. Now, when you were first stopped by Detective Hadley, did he put a blue light on you, a siren?

A. That, I couldn't say. I didn't know they was after me until I turned left on this gravel road, and then I don't know what made me notice them, but anyway I noticed the car behind me, and I stopped. Then Hadley got out and then he showed me in his pocket book he was a narcotics agent there, and Jimmy Antle, by that time he was out and I know Jimmy, and he showed me. They asked where I was going, and I told them I was going to a neighbor's to take some drinks and things.

Q. You knew who Detective Hadley was?

A. That's right.

Q. And did you call him by his name when you saw him?

A. I don't remember.

Q. Alright, did you tell him that you knew why they were there?

A. No, sir.

Q. Did you go on and deliver your drinks?

A. Yes, I did.

Q. They didn't arrest you when they stopped you, did they?

A. No.

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Q. They let you go?

A. (The witness nods yes.)

Q. Alright, did they tell you that you couldn't go deliver the drinks? You said you delivered some drinks.

A. I sure did.

Q. Did they say you couldn't do that, or did they let you go ahead and do it?

A. They let me do it.

Q. You told them you would meet them at your house?

A. That's right.

Q. And you delivered the drinks and came back to the house and met them?

A. They was waiting at the church house.

Q. Where is that? Is that on your property?

A. No, sir. The road I was going on over there to take these drinks, it's on that road.

Q. And then you went to your farm with them?

A. Went from there to my home, and let my wife out and took the groceries in, and then we went on up to the farm.

Q. And then you went up to the field?

A. No, sir.

Q. When did you go to the field?

A. Pardon?

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Q. When did you go to the field?

A. We went to the barn there and I asked Hadley what was he waiting on, and he said we was waiting on David Davenport and Doc Petty to show him the way down here, and I asked him would it be alright to go ahead and feed, and they said go ahead and feed, so I fed and watered my hogs, and when I come out Hadley told me this, we will

need some tractors to destroy these, and would you get a tractor to destroy these, and I said I would.

Q. Did you leave the farm to go get a tractor?

A. Yes, I did.

Q. How long were you gone?

A. Well, I drove my car there and drove the tractor back. I'd say a half hour or longer.

Q. Alright, now Detective Hadley told the Court that you told him that if these two fellows left without paying you for the lease that they would find their bodies floating in the river. Did you tell him that?

A. No, sir.

Q. Okay. Mr. Hadley said that you asked him if you were losing a hundred thousand by them destroying that Marijuana. Did you ask him that?

A. No, I didn't.

Q. Did you tell him that you knew who had tipped off

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the police to the Marijuana and that person could have a hunting accident?

A. I had no idea who turned me in.

Q. Well, did you tell Mr. Hadley that whoever turned you in could have a hunting accident?

A. What was that?

Q. Did you tell Detective Hadley that whoever turned you in could have a hunting accident?

A. No.

Q. Who are these two fellows that you leased the land to? Do you know them?

A. Jimmy Pyles and Eddie Voilles.

Q. Well now, I am talking about the land where the Marijuana was.

A. No, sir. I misunderstood you there.

Q. Okay. I don't want you to misunderstand me, the land where the Marijuana was found, you said you leased to a Mr. Joe Davis and Jimmy Culver.

A. That's right.

Q. Now, do you know who those two fellows are and did you know before you leased it?

A. Do I know who I leased the land to?

Q. Did you know them, these two fellows?

A. I sure do.

Q. Do you know where they live?

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A. Know where they live?

Q. Yes.

A. They told me they lived in Adair County.

Q. Had you known them before they leased the land from you?

A. For a good while.

Q. Have they leased land from other people to your knowledge?

A. Not as I know of.

Q. There is a lot of Marijuana growing up in Russell County and Marion County isn't there?

A. Not as I know of.

Q. You knew these two fellows were growing Marijuana and you just didn't want to bother them. Isn't that right? Did you know they were growing Marijuana up there?

A. No, sir.

Q. Now, how did they pay the eight hundred dollars, by check or cash?

A. Cash.

Q. Did you give them a receipt?

A. No, I didn't.

Q. Did you keep a record of receiving the eight hundred dollars?

A. No.

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Q. You don't keep any books or accounts or anything?

A. No.

Mr. Wendelsdorf: Okay, that's all the questions I have, Your Honor.

Mr. Wilson: Could I ask one or two more questions?

The Court: Yes, sir.

Redirect Examination by Mr. Wilson:

Q. Mr. Oliver, how far did you go in school?

A. Sixth grade.

Q. Have you had any education after that?

A. No, sir.

Q. What have you done for a living all your life?

A. Worked on the farm some and for the State.

Q. Do you have problems with your hearing? Do you have problems hearing things?

A. Yes, I do.

Q. Have you been to see a doctor about that?

A. Yes, I have.

Q. What's your doctor's name?

A. Moore over here at Bowling Green.

Q. Do you have trouble understanding what people say?

A. Yes, I do.

Q. From the problems you have, would it be possible that the officers advised you of your rights and you

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didn't hear them, or understand them?

A. They might have.

Q. Would it be possible for statements to have been made down there that you did not understand?

A. I might have.

Q. Were in fact statements made by the officers and others there that you did not understand? Did you understand everything that was said down there when you was down there at the Marijuana patch? Did you understand everything?

A. No, sir.

Q. Who else came down there? Did David Davenport come down there?

A. Yes, he did, and Doc Petty.

Mr. Wilson: That's all, Your Honor.

The Court: Anything further? Do you want the medical testimony?

Mr. Wilson: I have the deposition and I want to present it. It is in the record, Your Honor.

The Court: You may step down, Mr. Oliver.

Mr. Wilson: Your Honor, I understand the deposition has been filed in the record

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and will be considered by the Court for this purpose.

The Court: Yes, sir. Very well, is there anything further?

Mr. Wendelsdorf: Just in the form of argument, Your Honor. We can also offer a stipulation.

The Court: State what the stipulation is.

Mr. Wendelsdorf: Comes the Defendant and the United States by respective counsel and by stipulation admit into evidence, with leave of the Court, four photographs, Government's Exhibits numbers 1 through 4, and an aerial map to be labeled as Joint Exhibit Number 1, which has been labeled with the following landmarks: Kentucky Highway 379; The Oliver house on the Oliver property; the location of the locked gate mentioned in the testimony; the location of the barn and camper mentioned in the testimony; and the location of the two fields in which Marijuana was subsequently found. These fields are labeled

A and B. Government's Exhibits 1 through 4 are photographs of Field A. The parties also stipulate that the Marijuana fields are not visible from the river, which is separated from the fields by impenetrable barriers. The scale of the map is stipulated to be one inch on the map equal to six hundred feet on the ground. Is that

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fair?

Mr. Wilson: Yes.

Mr. Wendelsdorf: The United States so stipulates and I will ask Defense counsel if he stipulates to what I have just said.

Mr. Wilson: Yes, plus the posted signs.

Mr. Wendelsdorf: The parties also stipulate that there was a posted sign indicated by the "X"s at the juncture of Highway 379 and the gravel road leading into the Oliver farm, and also another posted sign at the locked gate. These posted signs are delineated by "X"s at the locations so stipulates. (sic.)

Mr. Wilson: That is a fair stipulation, and we agree to it.

Mr. Wendelsdorf: Your Honor, that's all except for argument.

The Court: I will hear your argument.

Mr. Wendelsdorf: First, Your Honor, I would point out to the Court that the Government stands by its objection to the Court's consideration of the deposition seeing as it was not taken pursuant to the rules with leave of Court, that there has been no showing that the witness is not available to testify. However,

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I understand the Court has already ruled, but my objection was not on the record. If the Court will examine the deposition, you will notice that the physician did not see Mr. Oliver professionally until October 21, 1980, which is well

in advance of this trial date, but sufficiently after the initiation of these proceedings that one could draw the conclusion that he went to see the doctor specifically to build a case for these proceedings. There is no evidence whatsoever presented to the Court that Mr. Oliver has been seeking professional help for his hearing problem on a long-term basis, certainly not all after it became to his advantage to have a doctor document his hearing problem.

The Court: Did not the lay witness, the witness offered by the United States, himself state that Mr. Oliver had a hearing problem, or am I wrong?

Mr. Wilson: Yes.

Mr. Wendelsdorf: Yes, Your Honor, and I would like to call the Court's attention to page 4 of the deposition where the doctor very clearly points out that the Defendant is not deaf, but that he has a fifty-two percent, I guess you might say his speech discrimination ability is fifty-two percent in one ear, and sixty-eight percent in one ear, and he indicates on

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page four that this discrimination would vary depending on the environment in which he was having the conversation.

The Court: Does that mean that in one ear he would only be able to understand sixty-eight percent?

Mr. Wendelsdorf: Well, according to the deposition, and of course this is exactly why it would be advantageous to have the doctor here for cross-examination, you cannot cross-examine a piece of paper.

The Court: Do you want to call him?

Mr. Wendelsdorf: No. The proof has been heard, but he explains what he means by that and what he says is that in a normal conversation Mr. Oliver would be able to hear fifty-two percent of that in one ear and sixty-eight percent in the other, but he points out that this discrim-

ination would vary depending upon the environment in which he was having the conversation. Now, Detective Hadley testified that he was aware of the Defendant's hearing problem, that he spoke very close to him and in a loud voice, and that the Defendant indicated through his responses to his questions that he understood not only what Detective Hadley was asking him in general, but in specifics the Miranda rights which

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Detective Hadley had given him. Now, very clearly we have a credibility problem here. We have one witness saying, I gave him his rights. He indicated to me that he heard those rights and that he understood them. We've got another witness who testifies that he was never given the rights. This is, of course, a mixed question of fact and law for the Court to determine. However, I would point out that there are other grounds upon which the statements may be admitted even if the Court should find that he did not hear the rights given to him by Detective Hadley. For example, as I pointed out in my response to the Motion to Suppress the Statements, the Miranda rights only attach during custodial interrogation and I have cited cases in my response dealing with non-custodial interrogations, one where an IRS agent interviews a person in his own home. That is not custodial investigation. Here we have a situation where it was the Defendant who stopped his car because he saw the police officers behind him in an unmarked vehicle. He volunteered the initial statements, I know why you are here. I will meet you up at the house. Then he goes off to deliver some items to a neighbor. Clearly not a custodial situation. He comes back and there are more conversations, and the remainder of the activities flow from that point forward. At that point, from the house, after he once

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again points out to Detective Hadley he knows why he is there, and he goes up there and Mr. Hadley testifies he gave him his rights and the Defendant understood them. I think clearly under the law we have a variable situation. We have some statements after he was given the Miranda rights. We have some statements volunteered after the rights. But all in all, I think the bulk of these statements came in and were not uttered in a custodial situation, but in the situation of volunteered statements. Here I would refer the Court to the citations in my response. The question we seem to be developing here is whether or not Hester versus United States is still good law. Of course in Hester, a 1924 case cited at 265 US 57, the Court held, and I quote, "The special protection afforded by the Fourth Amendment to the people and their persons, and houses and papers and effects, and is not extended to the open fields. Now, all of this was changed by Katz vs US in 1967, 389 US 352, and here the Supreme Court did away with the old geographic definition of the Fourth Amendment protections and issued its now famous pronouncements that the Fourth Amendment protects people and not places. The new standard became not where the place was protected, but whether the individual has a reasonable expectation of privacy in the area searched, but even in Katz the Supreme Court said, and I quote, again

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from page 351 of that opinion, What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections.- I don't believe Katz has diluted the power of Hester in any way. Indeed, the Supreme Court of the United States in two post-Katz decisions, one, United States v Santana, 427 US 43, a 1976 case, and also in Air Pollution Variance Board v Western Alfalfa Corporation, 415 US 861, a 1974

case. Both of these cases reaffirm the strength of Hester. In the Santana case, Santana was in a public place. She was not in an area where she had any expectation of privacy. Then it goes one to say, she was not merely visible to the public, but was exposed to public view, speech, hearing and touch as if she had been standing outside her house, citing with approval Hester v US. In the Alfalfa case, the Supreme Court held in Hester v US speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in the open field, and they find in this case, which was a regulatory case where an inspector had entered the land of a company in order to measure pollution, the Court held that this was well within the open field exception to the Fourth Amendment approved in Hester, so although the standard is changed, Hester is still good law, not because of the geographic theory, but because the Supreme Court is

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saying an open field is not an area where a person has a reasonable expectation of privacy. I cite other cases in my response. Consider also, Your Honor, the fact that the Defendant denies any interest whatsoever in the property. He testified from the stand that he had leased this property supposedly to these two individuals for a period of six months. He testified from the stand that when he leased the property he considered it as if they owned that property for the term of the lease. He said he never went up there and never checked with it. How can this Defendant have a reasonable expectation of privacy of property which he says somebody else owns? There was no violation. This falls within the open fields exception and approved by the Supreme Court in Hester and reaffirmed by post-Katz decisions, and this was not even from the Defendant's testimony, where he could have an expectation of privacy.

The Court: Mr. Wendelsdorf, what effect did the locked gate and four trespass signs have upon this in view of Hester and Katz?

Mr. Wendelsdorf: Well, I would think it would have more significance pre-Katz than it does post-Katz. In the pre-Katz environment geography was the all-important factor. In the post-Katz environment it is reasonable expectation of privacy, and the

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Supreme Court pointed out in Katz and subsequent cases, even if somebody does something in their own home, if it is open to public view and scrutiny then they do not have a reasonable expectation of privacy. As the Fifth Circuit Court of Appeals held in the case of US v. Williams, 581 F2d 451, that since Katz the application of the Fourth Amendment has been subject to a reasonable expectation of privacy. The open fields surrounding the house are not protected under the Fourth Amendment and a search of them need not be pursuant to a search warrant issued upon probable cause. The gate in question merely locked the road. It did not lock access to the land. As the detective testified, there was a gate across the road, but no fence. Persons could freely walk around the gate and enter the land, which is exactly what he did in this case, but the whole purpose of the open field exception is that even where there is a trespass, even when there is admittedly a trespass, as the Government admits there was here, the open field exception says the evidence is still admissible because that search is not unreasonable. Why isn't it? Because it is activity carried out in the open where anybody can see it, and even if the officer must trespass to get to the open fields, the evidence is admitted. I would refer the Court finally to the Ninth Circuit case of the US v. Basille, reported at 569 F2d

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1053, a 1978 case, where this very question was addressed by the Court. The Court in Basille held the Fourth Amendment protection against unreasonable searches and seizures does not extend to open fields, again citing Hester and a post-Katz case. Ever since Katz v. US the determination of whether a search was reasonable has depended upon a reasonable expectation of privacy, and whether it was reasonable. The Fourth Amendment protections do not extend to the open fields area surrounding the house and immediately adjoining curtilage. Therefore, any information obtained as a result of an open field which is a curtilage to the house results in a lawful acquiring of that information. I think it is information that the trespass does not vitiate the validity of the search in this case.

The Court: Do you argue then that the trespass signs are . . .

Mr. Wendelsdorf: Irrelevant.

The Court: In any case?

Mr. Wendelsdorf: Yes, Your Honor. Now, they are relevant to the extent that they may tend to show a reasonable expectation of privacy. In this case, however, the fact that there were merely trespass signs, but no physical barrier would certainly be relevant.

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The Court: The locked gate and the trespass signs give me a problem because I don't think we are dealing, we know we are dealing with a field.

Mr. Wendelsdorf: Yes, sir.

The Court: Are we dealing with an open field that invites casual intrusion, or are we dealing with a field which was posted, a field that had a locked gate on it, which would give notice to someone coming down the road or going around it that that land was private, and subjectively the man thought putting the trespass signs up

and locking the gate across the road in a remote area would protect his privacy. I think that's a real problem.

Mr. Wendelsdorf: I agree with that, Your Honor. That raises a problem, but we must balance that with the Defendant's own assertion that he did not even consider that to be his property during the lease. I would say this. The Sixth Circuit of Appeals has not had occasion at least to my knowledge, maybe Bob has found something else, any reason to rule on this open fields decision for the last sixteen years. I don't believe the Sixth Circuit has been faced with the issue in a post-Katz situation. I would only ask that should the Court feel that this evidence requires suppression that this ruling be made prior to the attachment of

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jeopardy, and the United States be given leave to present the issue to the Sixth Circuit, and we could resolve it once and for all, and I would say that I only mention that in the spirit of fairness, because I believe the facts and the law as it stands now clearly show this to be a permissible search, but I do not want to jeopardize my client's case.

The Court: Yes, sir. I will hear you, Mr. Wilson.

Mr. Wilson: Your Honor, with reference to the first argument, the first motion, with reference to our motion to suppress the statements supposedly made by the Defendant, in the deposition of Dr. Moore, on Page 4, line 9, quote: Speech discrimination means that under ideal circumstances with the best accoustics available he would hear fifty-two percent. He would understand fifty-two percent of the words spoken in his left ear, and approximately sixty-eight percent of the words spoken in the right ear. Now, someone with a hearing problem or impediment like this learns to compensate. They shortcut. They make answers to questions they don't really understand. I do not doubt that if Mr. Oliver's right were read to him he very easily

could have said, Yeah, that's okay, pal. That's his by word he usually uses.

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The Court: What is the by word?

Mr. Wilson: Pal or Pallie. I guess that's what he said. I am supposing that has not been proven. It is the burden of the Government to prove that an intelligent waiver was made. Now, the way these things are ordinarily proven is have a signed statement of waiver of rights, or at least a signed statement that the person has had their rights read to them and do understand those rights. Here there was no written statement presented. All of the deals are orally spoken words that become incomprehensible to Mr. Oliver. The Court had occasion to observe him from the stand and care had to be taken by both counsel for the Government and the Defense in order to make sure that Mr. Oliver understood our questions, and was able to make an answer. I doubt if that care with the Defendant's rights was taken in that Marijuana field. Dr. Moore further states in his deposition that any interference by background noise would further complicate matters such as a motor running on an automobile or a bushhog running in a field. We think it's not enough when faced with a problem that they have here, when the officer himself admits, yes, I knew he had a hearing problem. Why could he not then present to that individual the written forms that the State Police has in their possession and always uses?

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Why could he not simply ask Mr. Oliver to read this document and see if he understands it? That would not be too much to ask when the officer himself was on notice he was having difficulty hearing. Now, I agree with Mr. Wendelsdorf that there is a mixed fact and law question here. So there is some credibility gap, but the fact is uncontradicted that the man had a severe hearing loss, that the officer knew

that he had that loss, that the Government has a burden of proving an intelligent waiver, and they didn't take advantage of the fact that they had forms available to them for him to sign and for him to read his rights himself.

The Court: Given what you say is true, and I find from the statements of the officer, from the statements and observations of this Defendant, from his demeanor on the stand, that I don't believe he has the capability of deception. I find he has an extremely difficult hearing problem. I find that the Government has not met their obligation, under those circumstances to prove or to establish a voluntary waiver. I so find. How then, though, do you overcome the fact that Mr. Oliver was not in custody? How do you overcome the fact that these statements were voluntary and at least the original statements made to this officer were spontaneous? I think we have a problem in presenting our

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evidence, Mr. Wendelsdorf, under those circumstances, but I cannot find a voluntary waiver. I do not believe the Government meets its burden there, but I do have a problem at this time, and you had perhaps better address it before I make my final ruling.

Mr. Wilson: Your Honor, in response to that question, I will ask the Court to consider the circumstances as existed down there that day. These officers had just come from Mr. Oliver's property and had found what they say is approximately eight acres of Marijuana growing thereon. They went out to seek and find Mr. Oliver and did so find him. Now, I have problems with the statement that was made on the road. If the Court believes that that statement was made in the manner in which the officer says, which we deny, but if Mr. Oliver voluntarily said, I know why you are down here. Meet me on down at the farm and I will show it to you, then I will have to admit that under these circumstances that would be admissible. If that's all that

was said, if that was the first words that were spoken, but then he was under directions to go to the farm, and if Your Honor please, he spent several hours down there, long enough to make searches on this farm, long enough to destroy what they say was eight acres of Marijuana. Was there, according to Mr. Oliver's testimony, until approximately eight o'clock that night before they released him.

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Of course he was under arrest. They read him his rights. You don't read the rights to somebody who was not under arrest. He was in the custody of the officers. They say they read him his rights. If they did, they had to arrest him or did arrest him. They had him in their custody, and he so admits. He wasn't free to go to Louisville. He was free to do only as those officers demanded. I take the position that after the officers had the information that Marijuana was on that premises, and they held him in their custody at the farm, that the statements made at the farm would be inadmissible as being responsive to the questions from the officers. Officer Hadley says, I was wanting to talk to him, so I could question him, and he did so question him without receiving an intelligent waiver of his Miranda rights. Now, I am like the Court. I have problems with the statement on the road, but those questions thereafter when his freedom was restricted, when they had evidence against him and when the officer himself admits the purpose for his retention was to question him, then those statements thereafter would not be admissible.

The Court: Very well, anything further.

Mr. Wilson: Now, do you want me to address the other issue?

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The Court: Yes, sir.

Mr. Wilson: If Your Honor please, with reference to the motion to suppress the Marijuana actually seized . . .

The Court: There was a second reading of the Miranda rights, was there not?

Mr. Wilson: What's that?

The Court: There was a second reading of the Miranda rights? It was given twice?

Mr. Wilson: According to my client, he was given his Miranda rights in the automobile by State Police Officer David Bunch at approximately eight o'clock that night after the statements were made.

The Court: Very well.

Mr. Wilson: Your Honor, one of these cases, Burkholder v. Superior Court for the City of Hester, a California case which I furnished a copy to the Court, 158 Cal Rptr 87, has some interesting language that addresses the question that you asked the United States Attorney. In that case the facts were identical to this one. It was a locked gate, a posted area. The main difference was that one of the gates the officers picked to go through. The other ones they skirted around an area that was unfenced next to the gate. The Court there held that a warrant should have been

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required. Now, people who live in the country in order to have an expectation of privacy shouldn't have to put big fortresses up all over their property to make sure they have every square inch of their property completely fenced. This was fenced property. That was property that was hidden. This was property that was posted. This was property that the officer admits that he knew was posted, and that's the point. No matter how good a job it was, the officer knew, admitted, that there was a no trespass sign there. He knew this property was posted. Now, how many ever signs were there, this specific officer that went there has made an admission and did know that he in fact was going upon property that was posted. He was

acting on a tip that he had received. Now, as far as the question concerning Mr. Oliver's standing and the lease issue, the Government, as I perceive their theory of this case, and I could be wrong, I perceive their theory of this case to be that Mr. Oliver was using his land to grow Marijuana, that he might have used other people to lease his land so they could grow it, but they themselves say that Mr. Oliver was making the statements that he was losing a lot of money. The Government's theory has to play some interest in this crop to Mr. Oliver. His knowledge after the fact that Marijuana might have grown there would not be sufficient to sustain a conviction. He is charged

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with actually manufacturing Marijuana.

The Court: Will you seek an aider and abetter instruction?

Mr. Wendelsdorf: Yes, Your Honor. I thank counsel for anticipating the theory of the Government's case, but that's not the theory at all When he is finished I will be glad to respond.

Mr. Wilson: Well, if there is an aiding and abetting, still they have to show some knowledge to him. He had to know in some way that his land was being used to grow Marijuana. Now if he had that knowledge, let's assume that he did for the purpose of this argument, that's an assumption that he did is guilty that he did have some knowledge that the Marijuana was growing there and participated in some manner, then he had property there that was fenced, that was posted that had a locked gate, that was surrounded by huge hedgerows and trees that you couldn't see it way back up on his property. He had a right to reasonable expectation of privacy. That was still his land, land he had title to, and we believe he has standing. Since the Katz case there have been many juris-

dictions cited in my memorandum that have specifically found that there is something wrong with the situation where an officer cannot stop for a minute in the protection of a Defendant's right and go before

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an impartial magistrate and ask for a warrant. It's a simple thing to do. In this case they had the right probably to resort to helicopters, which were available to them only two weeks later in Marion County. They did not choose to do that, to actually view the Marijuana. Courts have sometimes held that you don't have a reasonable expectation regarding the aerial surviellance, but I believe a person has a reasonable expectation when he posts his property and locks his gates. He is in an area where you have trees grown up and hiding it. He has a reasonable expectation that he won't be trampled upon by anyone coming on his property. They won't be on his property. Thank you.

The Court: Do you have some further response?

Mr. Wendelsdorf: Well, Your Honor, the issue of standing of course is totally separate from the reasonable expectation of privacy. I think what the Defendant is trying to do is at least legally trying to have his cake and eat it too. When it comes to the question of culpability, he said I never bothered , I never when up there, and I never paid attention to what was going on. When it comes to culpability he has no interest in the property. When he has a reasonable expectation of privacy, all of a sudden he has privacy. He had

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the gates locked and had it posted. He had a very varied interest in protecting the property. The Government's theory is not that the Defendant manufactured the Marijuana or cultivated the Marijuana, but that he aided and abetted its cultivation. Proof would tend to show that he

leased the property with an angreement for a great deal of money knowing that it would be used . . .

The Court: Eight hundred dollars?

Mr. Wendelsdorf: No, Your Honor, the statement about the one hundred thousand would be the proof the Government would rely upon for that.

The Court: And do you say that he said he was getting a hundred thousand dollars?

Mr. Wendelsdorf: No, sir. Of course, I don't want to get into what the proof would be, but his statement about losing one hundred thousand dollars by destroying the Marijuana was a reference to the fact that he would in fact receive some of the profits from the manufacture of these drugs.

The Court: Then I would have to read more into the record than is here to come to that conclusion, would I not, at this point?

Mr. Wendelsdorf: Yes, Your Honor. Of course, now, it was Defense counsel who tried to get into the Government's theory and I will get away

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from it if the Court will just ignore it in its deliberations, but I would point out that whether or not be had a reasonable expectation of privacy is totally different from the standing. All standing does is give him a right to challenge the search. I realize he has standing, but whether or not he had expectation of privacy, I think it is altogether a different situation. In a California State case interpreting presumably the California Constitution is a far cry from the Supreme Court of the United States, and the Circuit Courts of the United States interpreting the law which is at issue here concerning the Fourth Amendment of the United States of America. It is well established in this case, apparently the Supreme Court of California chose to be more strict. Haply (sic.) for the Govern-

ment, we are not bound by the State of California Constitution when relying upon the Fourth Amendment.

The Court: Anything further? I will do some further research during the remaining lunch hour and I will let you know before the jury gets back from lunch.

Mr. Wendelsdorf: Thank you, Judge.

Mr. Wilson: Your Honor, did I give you the cases I have cited here?

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The Court: I don't know whether you did or not.

Mr. Wilson: May I leave them with you?

The Court: Yes, sir.

(Whereupon Court was recessed at 12:25 P.M. and was resumed at 1:19 P.M. in the courtroom out of the hearing of the jury:)

The Court: The evidence which was heard from the stand, the stipulations we have entered into and the exhibits and arguments at the end of all the stipulations will be transcribed.

(Whereupon the Court adjourned in this matter at 1:41 P.M. on November 13, 1980.)

Official Court Reporter affidavit omitted.

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No. 82-15

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that the warrantless search of his fenced and posted field was permissible under the "open fields" doctrine.

Petitioner was indicted in the United States District Court for the Western District of Kentucky and charged with manufacturing marijuana, in violation of 21 U.S.C. 841(a). Prior to trial, he moved to suppress evidence obtained from a warrantless search of his property, and the district court granted the motion (Pet. App. 21-24). A panel of the court of appeals affirmed (*id.* at 25-30). The court granted the government's petition for rehearing en banc, and, by a 5-4 vote, reversed the grant of the suppression motion (*id.* at 31-66).

1. The evidence adduced at a suppression hearing established that on July 18, 1980, an anonymous informant advised a Kentucky state police officer that petitioner was growing marijuana on his farm. The officer had heard other reports in the community to the effect that petitioner was engaged in some kind of questionable activity on his farm, so the officer, joined by a second detective, drove to petitioner's farm to investigate (A. 13-14).[1]

When the officers arrived at the farm, they drove down a road past petitioner's house to a point at which they encountered a locked gate across the road. There was no fence at one end of the gate, and there was a path around the gate at that point, which the officers followed (A. 14, 31, 39). They had walked several hundred yards along the road on the other side of the gate when they heard someone yelling at them from a distance that there was no hunting allowed. They announced that they were police officers and walked towards the place where they had heard the person shouting at them. When they arrived there, however, they did not find anyone (A. 14). The officers then returned to the road, walked some distance farther down the road, and discovered a large field full of marijuana (A. 15). The officers subsequently arrested petitioner for manufacturing a controlled substance.

Following a hearing, the district court suppressed the evidence of the discovery of the marijuana (Pet. App. 21-24). The court noted that the gate across the road was locked, that the property was posted with "No Trespassing" signs, and that the fields where the marijuana was located were in a secluded part of the farm (*id.* at 22). On the basis of these factors, the district court concluded that petitioner had a reasonable expectation of privacy in the area where

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[1] "A." refers to the appendix in the court of appeals.

the marijuana was discovered and that, because the officers had entered that area without a warrant, the discovery of the marijuana would not be admissible at trial.

2. A panel of the court of appeals affirmed the suppression order. The panel noted that under the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), warrantless searches are permitted of any area outside private residences and the "curtilage" around those residences (Pet. App. 27). However, the panel concluded that the *Hester* decision had been undercut by the Supreme Court's subsequent decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which held that Fourth Amendment rights generally turn on the presence of a legitimate expectation of privacy, not on distinctions in property concepts (Pet. App. 28). On the facts of this case, the panel held, petitioner had a reasonable expectation of privacy in the field where the marijuana was growing, since the field was located on the other side of a locked gate marked with "No Trespassing" signs (*id.* at 28-29). Because the Sixth Circuit's prior decision in *United States* v. *Hassell*, 336 F. 2d 684 (1964), cert. denied, 380 U.S. 965 (1965), relied on the *Hester* "open fields" doctrine, the panel declared that *Hassell* is "no longer the law of this circuit" (Pet. App. 30).

3. On rehearing en banc, a majority of the full court disagreed with the panel's conclusion that *Hester* had been undercut by *Katz*. The court noted that while the Supreme Court had been called upon in *Katz* to apply the Fourth Amendment to circumstances—the monitoring of a telephone conversation—"that could not have been contemplated at the time the Amendment was formulated and adopted," the open fields doctrine of *Hester* simply made a distinction that was " 'as old as the common law' " (Pet. App. 34-35). The court also observed that there were indications in the *Katz* opinion itself that the *Hester* doctrine was still considered valid (*id.* at 35-36), and that this Court had

on several occasions since *Katz* referred to *Hester* without ever suggesting that its principle had been diluted (*id.* at 37). The court concluded that any expectation of privacy that a property owner might have in his open field was as a matter of law unreasonable (*id.* at 36).

Chief Judge Edwards and Judges Keith, Lively, and Jones dissented, contending that the open fields doctrine of *Hester* applies only to areas from which the public is not excluded or to an object or activity that is exposed to public view. Because they concluded that petitioner had taken measures to exclude the public from his property that gave rise to a reasonable expectation of privacy, the dissenters expressed the view that the open fields doctrine did not apply here (Pet. App. 38-65). Judge Lively wrote separately to express his view that this case did not involve an "open field" at all within the meaning of *Hester* (*id.* at 66).

4. Petitioner contends (Pet. 6-16) that the court of appeals erred in applying the open fields doctrine here. Whatever the merits of petitioner's contention, it is presently not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

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[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

Petitioner correctly notes (Pet. 16) that the question of the scope of the "open fields" doctrine is currently before this Court in another case involving somewhat different facts, *Florida* v. *Brady*, cert. granted, No. 81-1636 (May 24, 1982). While the Court's decision in *Florida* v. *Brady* may have some bearing on this case, there is no need to hold this petition pending the Court's consideration of *Brady*. If the decision in *Brady* casts any doubt on the correctness of the decision below, petitioner can reap the benefit of that decision on his post-trial appeal, if he is convicted. There is no reason to hold this petition and further delay the trial in this case in which the indictment was returned in September 1980.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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No. 82-15

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RAY E. OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Constitution and statute:

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION[1]

Petitioner contends that the court of appeals erred in holding that the warrantless search of his fenced and posted field was permissible under the "open fields" doctrine.

Petitioner was indicted in September 1980 in the United States District Court for the Western District of Kentucky and charged with manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Prior to trial, he moved to suppress evidence obtained from a warrantless search of his property, and the district court granted the motion (Pet. App. 21-24). A panel of the court of appeals affirmed (*id.* at 25-30). The court granted the government's petition for rehearing en banc and, by a 5-4 vote, reversed the suppression order (*id.* at 31-66).

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[1]This supplemental memorandum is submitted in response to the Court's request of September 17, 1982.

1. The facts are detailed at pages 2-3 of our previous submission in this case. Briefly, it was established at the suppression hearing that Kentucky state police officers drove to petitioner's farm to investigate reports that he was growing marijuana there. Once at the farm, the officers drove down a road past petitioner's house until they encountered a locked gate across the road. The property was posted with "No Trespassing" signs. There was no fence at one end of the gate, however, and there was a path around the gate at that point. The officers followed the path, continued down the road, and eventually discovered a large field of marijuana.

The evidence further established that petitioner regularly leased his farmland to others (A. 43-44).[2] He told the police officers and testified at the hearing that he had leased the land where the marijuana was found to two other individuals for the purpose of growing corn (A. 21-22, 45-46, 52-54). Petitioner claimed that, since leasing the property, he had never visited it and that, as far as he was concerned, the property belonged to the lessees during the term of the lease (A. 56-57).

2. The district court suppressed the evidence of the discovery of marijuana, finding that the officers' warrantless entry onto petitioner's property violated a reasonable expectation of privacy. A panel of the court of appeals affirmed, finding that the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), had been undercut by this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), and that the locked gate and "No Trespassing" signs gave petitioner a reasonable expectation of privacy in his fields. On rehearing en banc, a majority of the full court disagreed with the panel, concluding that the open fields

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[2] "A." refers to the appendix in the court of appeals.

doctrine remained good law and that any expectation of privacy that a property owner might have in his open field was as a matter of law unreasonable.

3. Petitioner contends (Pet. 6-16) that the warrantless search of his open field violated the Fourth Amendment. This contention was correctly rejected by the court of appeals.

a. The question of the scope of the open fields doctrine is currently before this Court on different facts in another case, *Florida* v. *Brady*, cert. granted, No. 81-1636 (May 24, 1982). In *Brady*, police officers entered, without a warrant, a fenced and posted field and had to climb over the fence to gain entry. We argue in our brief as amicus curiae supporting reversal in that case that the fencing of an open field does not necessarily convert the field into an area in which there exists a legitimate expectation of privacy such that a search may be made only pursuant to probable cause and a warrant. Rather, we contend, an open field is an area of reduced privacy expectation that, even if fenced, requires no more than reasonable suspicion to justify a police entry.

b. If the government's position in *Brady* is adopted and the Court reverses the judgment of the Florida Supreme Court, it will be clear, a fortiori, that the decision in the instant case is correct. Even if the Court affirms in *Brady*, however, the result in this case would still be correct because of the factual differences between the two cases. First, although there was a gate across the road that barred vehicles from driving through petitioner's farm, there was no fence at all on one side of the gate, and there was a path around the gate that was clearly used by pedestrian traffic. Thus, as we noted in our brief as amicus curiae in *Brady* (at 23), petitioner took no measures to exclude outsiders from entering his property on foot, and he had no more expectation that an outsider would not enter than did the property owner in *Hester*.

Moreover, petitioner's claim to a legitimate expectation of privacy in the field where the marijuana was found is further undercut by his disclaimer of any personal interest in that part of the farm. Petitioner testified that he had leased the land behind the gate to third parties and that he did not use the leased land or even wander about on it (A. 56). Rather, he regarded the land as belonging to the lessees for the period of the lease. Thus, petitioner was in no position to exclude any guests of the lessees from the property and had no control whatsoever over the persons that entered. He had only a bare legal ownership interest in the property, but no legitimate expectation of privacy, and thus the police entry did not violate his Fourth Amendment rights. *Hester* v. *United States, supra;* see also *Rakas* v. *Illinois,* 439 U.S. 128 (1978); *United States* v. *Rios,* 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dyar,* 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978) (mere ownership does not necessarily confer "standing").

c. In sum, even if this Court finds a Fourth Amendment violation in *Florida* v. *Brady,* the court of appeals here correctly held that the law enforcement officers did not violate petitioner's Fourth Amendment rights when they entered his field. Nonetheless, because *Brady* can be expected to shed some light on the scope of the open fields doctrine, it might be appropriate to hold this petition for *Brady* if the present case were not interlocutory. But, as explained in our first submission, there is no reason to hold this petition because petitioner will still have the opportunity on his post-trial appeal — if he is convicted — to reap any benefits that accrue to him from the decision in *Brady.* Thus, holding this petition would serve no useful purpose

and would further delay for many months the commencement of trial on an indictment that was returned more than two years ago.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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[3]Contrary to petitioner's contention in his reply memorandum, he is not entitled to pretrial appellate review of his Fourth Amendment claims. If the district court had denied his suppression motion in the first instance, as the court of appeals has held it should have done, it would be clear that he could not appeal from that denial until after trial.

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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE

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October Term, 1982

No. 82-15

RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In its Memorandum in Opposition to the Petition for Writ of Certiorari filed in this case, the United States has raised an argument which merits reply. The Respondent contends "whatever the merits of Petitioner's contention, it is presently not ripe for review by this Court." [Mem. in Opp., p. 4]. The United States urges the Court to withhold its jurisdiction so that the case may be tried without "further delay", even though this Court has grant certiorari on the identical issue in *Florida* v. *Brady*, cert. granted No. 81-1636 (May 24, 1982). In support of this proposition the government states "[P]etitioner can reap the benefit of that decision on his post-trial appeal, if he is convicted." [Mem. in Opp., p. 5]. Peti-

tioner submits that this case is in fact ripe, and that the suggestion by the United States raises the possibility of needless and costly litigation, a conviction based upon unconstitutional search and seizure procedures, and is unsupported by case law.

Beyond this, the United States seeks to restrain this Court from granting the Petitioner an opportunity to appeal the decision of the Court of Appeals after having themselves already appealed adverse decisions on the same issue two times. The District Court suppressed the evidence, and the government appealed. [Pet. for Writ, App. A]. A panel of the United States Court of Appeals for the Sixth Circuit affirmed the suppression and the government appealed. [Pet. for Writ, App. C]. Now, after having had their day in court three times, the United States proposes that the decision, in their favor, of the Sixth Circuit setting en banc is a non-appealable order. The incongruity is apparent. In fact, this Court has declared that appeals by the government are not favored. *Will* v. *United States,* 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967). It is clear that only a ruling on this issue by this Court will finally resolve this issue.

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1254(1). [Pet. for Writ, p. 1]. Congress has provided in §1254(1) for review by the Supreme Court:

> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, ***before or after rendition of judgment or decree.***

It is clear that this Court's jurisdiction pursuant to the statute is plenary and comprehensive. The Petition before the Court is certainly ripe and falls within the ambit of its jurisdiction. Indeed, the very nature of the order below, the suppression of evidence without which there would be no case at all, lends itself to the issuance of the writ.

As early as 1897 this Court found that certiorari, although ordinarily issued after a final decree, may be issued if the Court is of the opinion that the facts of the case require an earlier interposition. *The Conqueror,* 166 U. S. 110, 113, 114 (1897). The facts herein require such an interposition by this Court. Should the issue presented by this writ be resolved in Petitioner's favor, the evidence obtained by the warrantless search and seizure would be suppressed, and the rights of the Petitioner will have been defined and vindicated. Further proceedings, in the absence of a ruling by this Court upon the admissibility of the evidence, could be a waste of time for the courts below, and, more importantly, could result in an erroneous conviction of the Petitioner, a conviction upon evidence obtained by methods this Court presently has the opportunity to judge.

This Court has consistently granted certiorari in cases in which the issues, like the one herein, were essential to the resolution of the case as a whole. In *United States* v. *General Motors Corp.*, 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945), the Court reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the

ruling was "fundamental to the further conduct of the case." 323 U. S. at 377. The issue of whether or not the only evidence in the government's case against the Petitioner was properly suppressed by the trial court is certainly fundamental to the further conduct of this case. In fact, it is the one factor without which the case cannot continue.

For similar reasons this Court reviewed rulings in *Land* v. *Dollar,* 330 U. S. 731, 734 n.2, 91 L. Ed. 1209, 67 S. Ct. 1009 (1947), and *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 685 n.3, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949), where, as here, the case would require further proceedings.

There are additional considerations. This Court in *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507, 94 L. Ed. 299, 70 S. Ct. 322 (1950), indicated that issues may arise that demand immediate resolution in order that the Defendant's rights be preserved. These considerations include "the inconvenience and costs of piecemeal review on one hand, and the danger of denying justice by delay on the other." 338 U. S. at 511. Furthermore, the requirement of finality is to be given a practical rather than a technical construction. *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949).

This Court's jurisdiction under 28 U.S.C. §1254(1) is comprehensive in criminal actions as well. This Court noted in *United States* v. *Clark,* 445 U. S. 23, 63 L. Ed. 2d 171, 100 S. Ct. 895 (1980), that jurisdiction under §1254(1) follows the same rule as 28 U.S.C. §1252. In *Clark,* the Court found that §1252, with its

"permissive language providing that any party may appeal from an interlocutory or final judgment," provides ample jurisdiction for the Court to grant certiorari.. 445 U. S., n.2 at 25.

Finally, Chief Justice Burger has stated that review may be granted by the Court even *before* judgment is rendered:

> "Any case decided in any district court with a genuine need for swift review by the Supreme Court can be the subject of a petition for certiorari before judgment." Burger, *Annual Report on the State of the Judiciary,* 62 A.B.A.J. 443, 444 (1976).

This Court's jurisdiction as described by 28 U.S.C. §1254(1) is plenary. Case law, fundamental fairness and practical considerations support the jurisdiction of this Court to review the merits of this issue as presented by the Petition for a Writ of Certiorari. Counsel for the Petitioner respectfully requests this Court to accept review of this case so that the fourth amendment right of the Petitioner to be free from unlawful searches and seizures may be preserved without fur-

ther proceedings in the Courts below, which proceedings are unreasonable in the absence of a determination of this issue by the Court.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Respondent, in its Supplemental Memorandum in Opposition to the Petition for a Writ of Certiorari, has argued that; (1) the Petitioner does not have the requisite standing to raise the issue presented herein, and that (2) even if he did, and even if this Court finds a Fourth Amendment violation in the case of *Florida* v. *Brady*, cert. granted, No. 81-1636 (May 24, 1982), the Petitioner in this case "took no measures to exclude outsiders from entering his property on foot," and that therefore he has waived his right to any Fourth Amendment protections this Court may uphold in its *Brady* decision. Petitioner respectfully submits that neither of these claims present sufficient opposition to this Petition for a Writ of Certiorari.

The Government has supported Petitions for Writs of Certiorari in two similar cases on the same issue presented herein, in *Florida* v. *Brady, supra,* as an Amicus, and in *United States* v. *Dunn,* No. 82-508, as the Petitioner, filed 9-22-82. How can it, in the exercise of sound and logical judgment, in good faith *oppose* this Petition?

I

Respondent claims because the Petitioner leased parts of his land to others to farm and grow corn, that he had no legitimate expectation of privacy, and thus the state troopers' entry did not violate his Fourth Amendment rights. In similar conclusory fashion, Respondent asserts that the Petitioner took no measures to exclude outsiders from entering his property on foot. To the contrary, this Petition for a Writ of Certiorari is replete with substantial evidence of Petitioner's legitimate expectation of privacy. The Respondent's arguments merely beg the issue while overlooking essential facts of this case.

The law certainly does not require landowners to do more than Petitioner had done to secure their privacy:

1. **The troopers entered Petitioner's property by turning on to a road posted with "No Trespassing Signs".**
2. **The troopers proceeded several hundred yards, past Petitioner's residence, ignoring "No Trespassing Signs".**

3. The troopers drove, on Petitioner's property, three-quarters of a mile beyond the Petitioner's home, and encountered a gate.

4. The gate, across the private road, was locked with a chain and padlock, and was posted with a "No Trespassing" sign.

5. After proceeding around this gate, the trespassers were warned, by someone shouting, to proceed no further.

6. The troopers ignored this request and searched further on Petitioner's property.

7. The troopers discovered the field of marijuana in question. This field was not visible from the Cumberland River, which flows beside it, nor from the posted and locked gate, and, of course not from the public roadway. The troopers had trespassed one mile onto Petitioner's property.

These facts lead reasonably to the conclusion that Petitioner Oliver had, in fact, done everything he could have done to secure his privacy.

Respondent cites the case of ***Rakas*** **v.** ***Illinois,*** **439 U. S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) as authority for the proposition that the Petitioner did not enjoy a legitimate expectation of privacy because he had leased the land to third parties. However,** ***Rakas*** **cannot be cited as authority for this argument which clearly misperceives the facts of this case. Contrary to Respondent's contentions,** ***Rakas*** **held that the definition of the rights described by the concept of**

standing are more properly placed within the purview of substantive Fourth Amendment law than within that of standing:

> Analyzed in these terms, the question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. *Rakas,* 439 U. S. at 140.

The proper analysis of the *Rakas* doctrine centers upon whether or not the Fourth Amendment rights of the Petitioner were violated. The Petitioner's Fourth Amendment rights were, in fact, clearly violated. The Respondent, in its Supplemental Response, is asking this Court to actually rule on the merits of the case before granting Certiorari for a proper consideration of those merits. Respondent's argument would be more properly addressed, according to this Court's holding in *Rakas,* in a full brief on the merits, after Certiorari has been granted.

II

The government has adopted inconsistent positions in regard to this Court's granting Certiorari on the issue presented by this Petition. Certiorari was granted by this Court in the case of *Florida* v. *Brady,* No. 81-1636, on May 24, 1982. Respondent, in its

Memorandum in Opposition and Supplemental Memorandum in Opposition, has pinned many of its hopes on this Court's determination of the "open fields" question in that case. It thus appears that the Respondent would have a substantial interest in the merits of a case surrounding the issue in *Brady,* and presented here. Yet, Respondent, after filing an amicus curiae brief to the *Brady* case, adamantly opposes the efforts of Petitioner Oliver to have the Court review the issue, ostensibly because:

1. If the *Brady* case is decided in their favor, it will be, "a fortiori", the law applicable to this case;
2. If the *Brady* case is *not* decided in their favor, the decision of the Court will not apply to this case because of "factual differences", and
3. The issue, once determined, need not be redetermined.

Respondent should not be allowed to "have its cake and eat it, too." Respondent admits the *Brady* decision will be recognized by it as controlling of the open fields issue ***only if decided in its favor.***

This is not all. On September 22, 1982, long after it asserted the inconsistent positions noted above, Respondent filed a Petition for a Writ of Certiorari on a nearly identical issue in *United States* v. *Dunn,* No. 82-508; 674 F. 2d 1093 (5th Cir. 1982), i.e., "Was the Fourth Amendment violated by law enforcement officers' warrantless entry onto defendant's ranch, in

which they crossed a perimeter fence and another interior fence but did not penetrate the enclosed residence and yard or any other structure?"

Petitioner respectfully submits that the facts of this case present a much clearer issue for review then the facts in *Brady*. *Brady* is prosecuted by the State of Florida, having arisen in that state's court system, the Petitioner's case had its origins and appellate reviews in the federal system. A decision on the merits presented in this case would go much further in resolving the split of authority in the United States Courts of Appeals concerning this issue.

Respectfully submitted,

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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether this Court's decision in *Katz* v. *United States*, 389 U. S. 347 (1967) modified the holding of *Hester* v. *United States*, 265 U. S. 57 (1924) to the extent of requiring a search warrant for the search of a highly secluded field from which the public is excluded when a reasonable expectation of privacy can be shown to exist in that field.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-15

RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit En Banc [Pet. App. 31-66] is reported at 686 F. 2d 356 (1982). The opinion of the panel of the Court of Appeals for the Sixth Circuit is reported at 657 F. 2d 85 (1981). The opinion of the District Court for the Western District of Kentucky is not reported. [Pet. App. 21-24.]

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit En Banc was decided and filed on May 5, 1982. The Petition for a Writ of Certiorari was filed on July 2, 1982. The Petition was granted on January 24,

1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutory Provisions:

21 U.S.C. §841(a), provides as follows:

> Except as authorized by this title it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or
>
> (2) to create, distribute or dispense or possess with intent to distribute or dispense, a counterfeit substance.

18 U.S.C. §2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioner is a 63 year-old retired farmer who was charged with manufacturing marijuana in violation of 21 U.S.C.S. §841(a)(1) and 18 U.S.C.S. §2. The United States District Court for the Eastern District of Kentucky held an evidentiary hearing on November 13, 1980, and ordered that the search of the Petitioner's property without a search warrant was in violation of the Petitioner's Fourth Amendment rights and, therefore, ordered that all evidence obtained as a result of that search must be suppressed. [Pet. App. 20.]

The Respondent filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on November 20, 1980. A panel of the Sixth Circuit, in an opinion rendered on August 7, 1981, affirmed the District Court's holding that the owner of an open field is entitled to Fourth Amendment protection if he has a reasonable expectation of privacy in his property. [Pet. App. 28, 29.]

The Respondent filed a timely petition for rehearing en banc which was granted. The Sixth Circuit, in an opinion rendered on May 5, 1982, reversed its previous finding and held that the open fields doctrine first announced in *Hester* v. *United States*, 265 U. S.

57 (1924), is valid as applied to the facts of this case. [Pet. App. 37, 38.]

The Petitioner filed a Petition for a Writ of Certiorari, which was granted by this Court on January 24, 1983.

The facts adduced at the suppression hearing demonstrate that the Petitioner is a 63 year-old retired farmer, who had been employed by the Kentucky Department of Highways as a laborer, and, on the date of the search, lived on his farm with his wife and daughter. Portions of Petitioner's land were leased to farmers for the purpose of growing corn. The marijuana discovered by the Kentucky State Police was located on two of these leased fields. [J.A. 9, 27.]

On or about July 18, 1980, Kentucky State Policemen Ben Hadley and Jimmy Antle received a tip from an anonymous informer to the effect that marijuana could be found growing on the Petitioner's farm. The State Police proceeded directly to the Petitioner's farm without making any attempt whatsoever to procure a warrant for the search of the Petitioner's farm. [JA. 12.] The State Police did not have probable cause for the search. No exigent circumstances were present. [Pet. App. 40, f.n. 4.]

The State Police approached the Petitioner's farm on a state road and then turned onto Sugar Camp Road which led to the Petitioner's land which was posted with a number of "No Trespassing" signs. [J.A. 26.] The State Police ignored the "No Trespassing" signs and proceeded several hundred yards

to the Petitioner's residence. [J.A. 4, 5.] The State Police had no warrant and made no attempt to procure the Petitioner's consent to enter the premises which were clearly posted with "No Trespassing" signs at four different intervals. [J.A. 16, 26.]

The State Police had proceeded approximately three-quarters of a mile beyond the Petitioner's house when they encountered a gate on the property that blocked the road. [J.A. 16.] This gate was locked with a chain and padlock and was posted with a "No Trespassing" sign. [J.A. 26, 29.]

Unable to proceed further by automobile, the State Police continued on foot around the locked gate to a barn on the property which was located about three-fourths of a mile beyond the house. [J.A. 3.] At this point, someone appeared near the barn and called to them to come back, explaining that hunting was not allowed. [J.A. 3, 4.] The State Police ignored this request to leave and proceeded further through fields and wooded areas until they entered a secluded field and found marijuana. [J.A. 4.]

It is important to note that it is undisputed that the field where the marijuana was found is *completely secluded*. The government has stipulated that this field is not visible from the Cumberland River which borders a major portion of the Petitioner's land. Nor is it visible from the posted and locked gate which was ignored by the State Police, nor from the Petitioner's house. [J.A. 41, 30, 31.] In other words, the marijuana could not be seen by anyone standing on land other than that owned by the Petitioner, and then only

after the State Police had ignored five "No Trespassing" signs, a locked gate, verbal warnings to not trespass, and had traveled about one mile and a half onto Petitioner's property.

The State Police then left the Petitioner's farm and met him on the highway returning from a neighbor's house and placed him under arrest for cultivating marijuana.

SUMMARY

Petitioner respectfully requests this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit which held that the Kentucky State Policemen's warrantless search of Petitioner's property did not violate Petitioner's Fourth Amendment right against unreasonable search and seizure.

The government contends the warrantless search of Petitioner's property was made pursuant to one of the exceptions to the Fourth Amendment warrant requirement, the so-called open fields doctrine. It is Petitioner's position that the government cannot justify the unlawful search in this case because the open fields doctrine has been modified by this Court's decision in *Katz* v. *United States*, 389 U. S. 347 (1967).

Searches conducted outside the judicial process without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment. *Katz, supra.* The government bears the burden of establishing that this warrantless search was conducted within the narrow confines of a well-established and

specifically delineated exception to the requirements of the Fourth Amendment. *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971).

The open fields doctrine relied on by the government is the result of the combination of this Court's decisions in *Hester* v. *United States,* 265 U. S. 57 (1924) and *Olmstead* v. *United States,* 277 U. S. 438 (1928). The essence of the *Hester* decision was that evidence obtained as a result of observations made by police officers which could have been made by any member of the public was lawfully seized. *Olmstead* contributed a "constitutionally protected area" concept to the doctrine, declaring that open fields were not constitutionally protected areas. This per se locational approach to the open fields doctrine was criticized by the courts and was finally substantially modified by this Court in *Katz.*

The *Katz* decision established a two-part test for determining whether an individual has a reasonable, and therefore, constitutionally protected expectation of privacy: First, whether the individual had an actual —subjective—expectation of privacy; and secondly, whether this expectation is one which society is prepared to accept as reasonable.

The narrow holding in *Hester,* that federal agents could trespass onto an area from which the public was not excluded and view that which was exposed to the public without violating the Fourth Amendment, remained intact after the *Katz* decision. *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861

(1974). At the same time, *Olmstead's* "constitutionally protected area" rationale was overruled. *Katz,* 389 U. S. at 353. Open field searches, therefore, are to be analyzed according to this standard: warrantless searches for objects (1) not exposed to the public, and (2) located in areas from which the public is excluded, are subject to the reasonable expectation of privacy test of *Katz.*

This Court reaffirmed this standard of analysis in *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307 (1978), in which the Court stated that, without a warrant, a government agent is in no better position than a member of the public.

In suppressing the evidence obtained by the unlawful search in this case, the District Court found that the Petitioner exhibited a reasonable expectation of privacy: "Short of posting guards at the entrance, it is difficult to see what else the defendant could have done to assert his privacy interest in his property." [Pet. App. 23.] The Kentucky State Police ignored verbal warnings, fences posted with "No Trespassing" signs, a locked gate, and more than a mile of densely wooded land in the course of their unlawful search. **According to the standard set forth by this Court for analysis of searches under the Fourth Amendment, the Kentucky State Police clearly and purposefully violated Petitioner's Fourth Amendment right against unreasonable search and seizure, and the evidence obtained as a result of this unlawful search should be suppressed.**

ARGUMENT

I. The Kentucky State Police Intentionally Circumvented the Warrant Requirement of the Fourth Amendment and Searched Petitioner's Farm Without Exigent Circumstances or Other Justification and the Trial Court Properly Suppressed the Evidence Obtained as a Result of This Unlawful Search.

A. The Government Has Failed to Establish That the Warrantless Search of Petitioner's Property Was Conducted According to an Exception to the Fourth Amendment Warrant Requirement.

The Fourth Amendment to the United States Constitution was proposed as a protection against arbitrary governmental intrusions on the privacy of its citizens. Its importance in the scheme of liberty contemplated by the founding fathers is most evident in the context of its origins. Early in our nation's history, government officials issued writs of assistance and general warrants to revenue officers, empowering them, in their discretion, to search places for smuggled goods. A great and vocal opposition arose to these abusive and warrantless writs, the opposition John Adams referred to when he declared:

> Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. *Boyd* v. *United States,* 116 U. S. 616, 623-630 (1886).

In response to these writs, and other intrusive acts of the government, the Fourth Amendment was drafted in 1787. The essence of the protection provided by the

Fourth Amendment is the warrant requirement. The Amendment reads, in pertinent part:

> [A]nd no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This requirement was explained by this Court, in the recent case of *Payton* v. *New York,* 445 U. S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). The Court noted that the warrant requirement was interposed between the public and the police because the decision to search or seize should rest with a detached and disinterested party.

> At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home *or expectation of privacy* must be strictly circumscribed. [Citation omitted.] To achieve that end, the framers of the amendment interposed a warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field but rather with a detached and disinterested Magistrate. [Emphasis added.] *Payton,* 445 U. S. at 582, f.n. 17, citing *McDonald* v. *United States,* 335 U. S. 451, 93 L. Ed. 152, 69 S. Ct. 191 (1948); *Johnson* v. *United States,* 333 U. S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948).

The detached and disinterested magistrate plays an important role in the protection of the rights preserved by the Fourth Amendment, and, as noted above, the

individual's *expectation of privacy* is central to the determination of the interests protected by that Amendment. This Court in *Johnson* v. *United States, supra,* noted the Fourth Amendment prohibits police officers actively engaged in "the often competitive enterprise of ferreting out crime" from using unlimited discretion in search and seizure:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached Magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. 335 U. S. at 14.

This Court's decision in *McDonald* v. *United States, supra,* reaffirmed that evidence obtained by a search and seizure made without a search warrant should be suppressed when no compelling reasons justify the non-procurement of a search warrant. In *McDonald* this Court again reasoned that the right of privacy was too precious to entrust to the discretion of police officers and that in order to justify a warrantless search, police officers must show some type of exigent circumstances. *Id.,* at 455.

The record in this case reveals that there were no compelling reasons or exigent circumstances to justify the non-procurement of a search warrant. The Kentucky State Police unjustifiably circumvented the warrant requirement. The State Police received a tip

from an anonymous informer to the effect that marijuana could be found growing on the Petitioner's farm. The Police proceeded directly to the Petitioner's farm without making any attempt whatsoever to procure a warrant for the search of Petitioner's farm.

This Court has strictly construed any proposed abrogations of the privacy interest protected by the Fourth Amendment. "[S]earches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States,* 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041, 2043 (1973); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454-455, 29 L. Ed. 2d 564, 91 S. Ct. 2022, 2031-2032 (1971). The government bears the burden of establishing that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *Coolidge,* 403 U. S. at 455. Petitioner submits that the government has failed to establish that the warrantless search of the Oliver farm was conducted within one of these narrow exceptions. The evidence was seized in violation of the Fourth Amendment and the search and seizure is not excusable upon the grounds of any exception to the Fourth Amendment. The evidence was properly suppressed by the trial court applying the exclusionary rule. [Pet. App. 19.]

The exclusionary rule was developed to provide protection against precisely the sort of constitutional violation presented in this case. This Court, in *Weeks* v. *United States,* 232 U. S. 383 (1914) held that evidence seized in violation of a defendant's Fourth Amendment rights could not be used against that person at trial. The exclusion of the evidence is particularly important in this case, as the actions of the State Police demonstrated an obvious disregard for the Petitioner's Fourth Amendment rights.

The State Police, acting on an anonymous tip and without probable cause, drove to Petitioner's farm without obtaining a warrant. They drove onto Petitioner's land, past four "No Trespassing" signs, past his home, and to a locked gate, which was posted with another "No Trespassing" sign. The State Police left their car at the gate, walked between the posted gate and a fence, and proceeded further into Petitioner's private, secluded land. When they were three-quarters of a mile beyond Petitioner's home, someone called to them requesting that they leave the property. The State Police did not leave, but continued further, walking another half of a mile through densely wooded and overgrown riverbottom land before discovering the marijuana. The government stipulated that the fields are not visible from the river, which is separated from the fields by "impenetrable barriers". [J.A. 41.] A primary justification for the exclusionary rule is that its application deters repeated constitutional violations such as those in this case. The government should not be allowed to benefit from its unlawful conduct. See,

Elkins v. *United States*, 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960).

B. This Court Ruled in *Katz* v. *United States* That the Per Se "Constitutionally Protected Area" Open Fields Doctrine Relied Upon by the Government to Justify the Unlawful Search and Seizure Is No Longer Controlling Because the Fourth Amendment Protects People, Not Places.

According to *Katz* v. *United States, supra*, the Court must first look for a specifically established and well-delineated exception to the warrant requirement whenever it is presented with a warrantless search that implicates the Fourth Amendment. The government alleges that the search in question was legitimate under the so-called open fields doctrine. The government's reliance upon the doctrine does not justify the warrantless search in question. The open fields doctrine is not a specifically established and well-delineated exception to the Fourth Amendment.

The open fields doctrine relied on by the government is the result of a combination of this Court's decisions in *Hester* v. *United States*, 265 U. S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924) and *Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928). The synthesis of these decisions by the Courts of Appeal produced much confusion and an interpretation of Fourth Amendment rights that was unfaithful to the decrees of the authors of that Amendment.

In *Hester* the Court stated, simply, that Fourth Amendment protections did not extend to open fields. 265 U. S. at 59. In *Hester*, the Court noted that reve-

nue officers did not violate the defendant's Fourth Amendment rights even though they trespassed onto his land, because the defendant's own acts and those of his associates disclosed the evidence. 265 U. S. at 58. Any member of the public could have observed what the revenue agents observed. Indeed, while the agents were at the house, other cars stopped to see Mr. Hester. *Id.* The public was not excluded from viewing the broken and discarded jars of moonshine spotted by the revenue agents. The *Hester* opinion itself, then, supported its open fields decision with evidence that the area or item searched was exposed to the public.

The phrase "open fields" was further described by this Court in *Olmstead*. The *Olmstead* court determined that there had to be an actual physical intrusion into the defendant's house or surrounding curtilage before the defendant could allege a violation of his Fourth Amendment rights. 277 U. S. at 466. In *Olmstead* an illegal liquor importing conspiracy was uncovered by federal prohibition officers by means of wire taps. The Court based its decision admitting the evidence on an analysis which focused on physical invasion of constitutionally protected areas. The open fields standard that was the result of this analysis could be stated: the open field area beyond the curtilage is not an area entitled to Fourth Amendment protection.

This doctrine was flawed from its inception because it attempted to apply narrow utilitarian, common law property concepts to the far-reaching and fundamental protections envisioned by the authors of the Fourth

Amendment. The term "curtilage" was originally used at common law to describe those buildings which could be the subject of burglary. See W. LaFave & A. Scott, *Criminal Law*, 712-13 (1972). Curtilage is generally defined as the enclosed space of ground and buildings immediately surrounding a dwelling house. Black's Law Dictionary, 346 (rev. 5th ed. 1979).

This flaw in the doctrine was noted by Justice Brandeis in a dissent to the *Olmstead* decision. Justice Brandeis realized that such a narrow interpretation of the Amendment, although easy to apply, did not effectuate the intent of the framers. 277 U. S. at 472, Brandeis, J., dissenting. Caution is required, he warned, when interpreting the Constitution, and ease in application alone should not be a standard for this interpretation:

> Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. 277 U. S. at 473.

The locational approach to the Fourth Amendment was questioned by later decisions of this Court. In *Silverman* v. *United States*, 365 U. S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961), this Court discredited the "material object" or "physical place" requirement from cases such as *Olmstead* and *Hester* and held that conversations could be the subject of an illegal search. 365 U. S. at 512.

In *Maryland Penitentiary* [*Warden*] v. *Hayden*, 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967), this Court echoed Justice Brandeis' earlier criticisms of the use of rigid property concepts in Fourth Amendment analysis. The Court stated that it "refused" to allow such subtle distinctions to govern constitutional analysis:

> In determining whether someone is a 'person aggrieved by an unlawful search and seizure, we have refused' to impart into the law . . . subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, has been shaped by distinctions whose validity is largely historical. 387 U. S. at 305.

The *Hayden* Court concluded that the principal objective of the Fourth Amendment was the protection of privacy rather than property. *Id.*, at 304.

The open fields doctrine of *Hester* and *Olmstead* received its final and complete discreditation by this Court's decision in *Katz* v. *United States, supra.*

Katz overruled the Fourth Amendment "constitutionally protected areas," or, actual physical invasion, analysis utilized by the courts since *Olmstead.* In *Katz,* the scope of protection provided by the Fourth Amendment was completely redefined; the relevant analysis was finally focused on privacy, rather than property concepts. The Court concluded that the Fourth Amendment protects people, not places. 389 U. S. at 353.

In *Katz*, the F.B.I. had listened to the defendant's conversations by placing an electronic device on the outside of a telephone booth. The government and the defendant briefed the issue of whether the telephone booth was a constitutionally protected area, according to the old Fourth Amendment analysis. This Court rejected the per se "locational" theory and concluded that such an analysis "deflects attention from the problem" of the scope of Fourth Amendment protection. *Id.*, at 350-353. Directly attacking the continued relevance of the *Olmstead* decision, the Court noted that "we have since departed from the narrow view on which the decision rested." *Id.*, at 352-353.

> Indeed, we have expressly held that the Fourth Amendment governs not only the service of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States, supra.* Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. *Id.*

The Court then concluded:

> **We conclude that the underpinnings of *Olmstead* and *Goldman* [316 U. S. 129 (1940)], have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. *Id.***

The property concepts of trespass and curtilage were thereby discredited by the Court in *Katz*. Thereafter, they were to be considered only as *factors*, not as conclusive determinations. In so finding, the Court referred to the basis for the Fourth Amendment warrant requirement. The purpose of that requirement, it stated, was to obtain an independent judicial review of the basis of the probable cause to search prior to the intrusion. *Id.*, at 357. To support this principle, the Court declared that "searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Id.*, at 357.

The *Katz* Court found that the defendant had in fact been subjected to an illegal search, because of the warrantless governmental intrusion into an area in which he had a justifiable expectation of privacy. *Id.*, at 353. The standard of scrutiny the Court has used in applying the *Katz* holding to search and seizure cases is derived from Justice Harlan's concurrence. The scope of Fourth Amendment protection in each case is determined by a two-part test:

> First, that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation is one that society is prepared to recognize as reasonable. *Id.*, at 361.

Because *Olmstead* is "no longer controlling," and because the focus of Fourth Amendment analysis is now on persons rather than places, the discredited open

fields doctrine must be reassessed in accordance with this Court's decision in *Katz*.

II. According to This Court's Modern Open Fields Analysis the Warrantless Search of Petitioner's Farm Violated the Fourth Amendment Because the Petitioner Exhibited an Actual and Reasonable Expectation of Privacy in Securing the Area Searched Which Was Not Exposed to the Public and From Which the Public Was Excluded.

A. The Area Searched Was Not an Open Field.

The narrow holding in *Hester*, that federal agents could trespass onto an area *from which the public was not excluded* and view that which was exposed to public view without violating the Fourth Amendment, remained intact after the *Katz* ruling. *Air Pollution Variance Board* v. *Western Alfalfa*, 416 U. S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974). At the same time, *Olmstead's* "constitutionally protected area" rationale was overruled. *Katz*, 389 U. S. at 353. Open field searches, therefore, are to be analyzed according to this standard: ***Warrantless searches for objects (1) not exposed to the public; and (2) located in areas from which the public is excluded, are subject to the reasonable expectation of privacy test of Katz.***

This standard represents the application of the sound principle from *Katz*, that the Fourth Amendment protects people, not places, to that part of the open fields doctrine from *Hester* that remained intact after *Katz*. This standard was also suggested by Judge Keith in his well-reasoned dissent to the en banc deci-

sion of the Sixth Circuit Court of Appeals, the decision from which this Petition arose. *United States* v. *Oliver,* 686 F. 2d 356 (6th Cir. 1982). [Pet. App. 31.]

The search in this case clearly violated Petitioner's Fourth Amendment right against unlawful search and seizure. The Kentucky State Police did not have a warrant, and the search was *not* conducted pursuant to a "specifically established and well-delineated exception". (See, *Katz, supra.*). The area searched was (1) not exposed to the public, and (2) was located in an area from which the public was excluded. The State Police ignored five "No Trespassing" signs, a locked gate, verbal warnings, and more than a mile of secluded and densely overgrown farm land in order to reach the area searched. The threshold question under the proper analysis, *"Was the public excluded from the area searched without a warrant?"*, is answered affirmatively.

This standard has been accepted by this Court as dispositive of Fourth Amendment problems similar to the case at bar. In *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974), this Court held that a federal agent could trespass onto an area from which the public was not excluded and view that which was exposed to the public without violating the Fourth Amendment. The Court considered the area searched an "open field" because the public was *not* excluded, and the view was, in fact, exposed to the public. *Id.*, at 865. The defendant's claim that his Fourth Amendment right had been violated, therefore, was denied. The Court em-

phasized that while "the field inspector was on respondent's property we are not advised that he was on premises from which the public was excluded." *Id.*

The decision in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) refined this analysis, this Court concluding that, without a warrant, *a government agent is in no better position than a member of the public,* and, conversely, observations capable of being made by the public can be made by the government agents without a warrant. [Emphasis added]. *Id.*, at 315.

In *Marshall,* a businessman refused to permit an inspector from the Occupational Safety and Health Administration to conduct a warrantless search of his business premises pursuant to statutory authorization from the Occupational Safety and Health Act of 1970. The Court ruled that such a statutory authorization was unconstitutional as it violated the Fourth Amendment. *Id.*, at 325. In reference to the government inspector, the Court stated:

> Without a warrant he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspection as well. *Id.*, at 315.

This analysis defines the essential issue, and accurately describes the modern application of the open fields doctrine; i.e., that the doctrine is legitimate only when applied to areas that are open to or are capable of being viewed by the public.

Further, it should be noted that *Western Alfalfa* and *Marshall* addressed the Fourth Amendment in light of administrative searches. This Court has long recognized that criminal cases demand an even higher standard of scrutiny. See *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), at 535-39; and *Marshall* v. *Barlow's, supra.* Therefore, an analysis of Fourth Amendment violations derived from these cases must be strictly applied to the facts of the criminal case at hand.

The Kentucky State Police in this case had no warrant. According to *Western Alfalfa* and *Marshall,* then, the State Police stood in no better position than a member of the public. Further, the area searched was not observable by the public. The Petitioner had posted his private gravel road. A locked metal gate blocked this gravel road. That gate was posted. The fields in question are highly secluded: they are bounded on all sides by woods, fences, and embankments and the Cumberland River. And, as conclusive evidence of Petitioner's intent to exclude the public, the Police, mistaken for hunters, were *told* "No Hunting. Come Back Up Here!" The area searched was not visible from the public road, or from the Cumberland River, along which it rested.

Because the area searched was highly secluded, and was not exposed to the public, and because the State Police had no warrant, the search should be analyzed according to the reasonable expectation of privacy test of *Katz*. As noted, this expectation of privacy is determined, according to *Katz*, by reference to (1) whether the individual has, by his conduct, exhibited an

actual (subjective) expectation of privacy, and (2) whether the individual's expectation of privacy is one that society is prepared to accept as reasonable.

B. The Petitioner Exhibited an Actual Expectation of Privacy Which Society Is Prepared to Accept as Reasonable.

It is clear that the Petitioner, by his conduct, exhibited an actual expectation of privacy. The District Court considered the circumstances of the warrantless search of the Petitioner's farm and concluded: "Short of posting guards at the entrance, it is difficult to see what else the defendant could have done to assert his privacy interest in this property." [Pet. App. 23.] The State Police encountered and ignored visual, physical, and verbal manifestations that the Petitioner expected privacy.

It is equally clear that the expectation of privacy Petitioner exhibited is one which society is prepared to accept as reasonable. It is easiest to address the reasonableness of this expectation by considering the practical effect of a ruling that Petitioner's expectation of privacy was not reasonable. Such a ruling would operate as a blank check to government agents everywhere, instructing them that, without a warrant, they are henceforth free to ignore the "No Trespassing" signs, locked gates, fences, and verbal warnings by farmers upon whose land they venture. Even more frightening is the spectre of court sanction, or worse, encouragement, of this obvious assault on the rights preserved to the citizens by the Fourth Amendment.

Sadly, such encouragement can be noted in the opinion of the Sixth Circuit Court of Appeals, in its decision overruling the District Court's suppression order:

> In weighing the privacy interest of the owner of open fields against the public interest in law enforcement's making *random* investigations to detect the production of drugs and moonshine, the public interest should prevail. [Emphasis added]. [Pet. App. 38, f.n. 5.]

Not only did the Court assume, quite incorrectly, that the field in question was "open,"—when according to this Court in *Western Alfalfa* and *Marshall* it was not—but the Court also chose to ignore the constitutionally-mandated nexus between probable cause, the warrant requirement, and the Fourth Amendment. Petitioner submits the public interest is more fully served by adherence to the constitutional rights preserved in the Fourth Amendment.

III. The United States Courts of Appeal Have Held That Where the Area Searched Was Not Exposed to the Public and Measures Were Taken to Exclude the Public the Individual's Expectation of Privacy Is Reasonable and a Warrantless Search of That Area Is a Violation of the Fourth Amendment.

The United States Courts of Appeal have rejected a per se approach to open field searches and have supported Petitioner's argument that the open field doctrine must be reassessed in light of *Katz'* reasonable expectation of privacy analysis. The Sixth Circuit, however, retained the discredited per se locational ap-

proach. Other Circuits have extended the protection provided by the Fourth Amendment by analyzing the facts in reference to the *Katz* standard.

In *United States* v. *Lace,* 669 F. 2d 46 (2d Cir. 1982), cert. den. 103 S. Ct. 121 (1982), the Court of Appeals for the Second Circuit cited what it called the "*Hester-Katz* rationale" as controlling in open field cases. 669 F. 2d at 51. The "*Hester-Katz* rationale" is precisely the standard Petitioner has herein submitted to this Court; that what is observable by the public is observable by the police as well, and, what is excluded from the public, is similarly excluded from the warrantless police. Once excluded, the burden is on the police to demonstrate that the expectation of privacy was not manifest, or was unreasonable.

The *Lace* Court held that evidence of the defendant's activities which were visible to the public was properly observable by the police, as well. *Id.* The Court relied on *Katz, Marshall* v. *Barlows, Inc.,* and *Western Alfalfa* for its decision. The *Lace* Court noted the abundant authority for its holding:

> What was observable by the general public was observable without a warrant by the police as well. *Marshall* v. *Barlows, Inc.,* 436 U. S. 307, 315, 98 S. Ct. 1916, 1921, 56 L. Ed. 2d 305 (1978); see *United States* v. *Dionisio,* 410 U. S. 1, 14, 93 S. Ct. 764, 771, 35 L. Ed. 2d 67 (1973), (citing *United States* v. *Doe,* 547 F. 2d 895, 898-99 (2d Cir. 1972), cert. denied, 410 U. S. 941, 93 S. Ct. 1376, 35 L. Ed. 2d 608 (1973)); *United States* v. *Miller,* 589 F. 2d 1117, 1133-34 (1st Cir. 1978), cert. denied, 440

U. S. 958, 99 S. Ct. 1499, 59 L. Ed. 2d 771 (1979); *United States* v. *Knight,* 451 F. 2d 275, 278 (5th Cir. 1971), cert. denied, 405 U. S. 965, 92 S. Ct. 1171, 31 L. Ed. 2d 240 (1972).

Among the lower court decisions adopting the Hester-Katz rationale, the following are illustrative:

United States v. *Varkonyi,* 645 F. 2d 453 (5th Cir. 1981).

View from roadway of illegal aliens working in delivery area of defendant's fenced scrap metal yard.

Patterson v. *National Transportation Safety Board,* 638 F. 2d 144 (10th Cir. 1980).

Examination of exterior of plane parked at private airport.

United States v. *Magana,* 512 F. 2d 1169 (9th Cir.), cert. denied, 423 U. S. 826, 96 S. Ct. 42, 46 L. Ed. 2d 43 (1975).

View of defendant in front of garage from police car driven into private residential driveway.

United States v. *Hensel,* 509 F. Supp. 1376 (D.Me. 1981).

Surveillance of outdoor premises with a telescope, a spotting scope, binoculars, and a nightscope, plus aerial surveillance and physical entry onto driveway.

See also *United States* v. *Arboleda,* 633 F. 2d 985, 991-92 (2d Cir. 1980); *United States* v. *Mullinex,* 598 F. Supp. 512 (E.D. Ky. 1980); *United States*

v. *DeBacker,* 493 F. Supp. 1078 (W.D. Mich. 1980). *Id.,* at 50, 51.

The Fifth Circuit has enforced an even more expansive interpretation of Fourth Amendment analysis under the *Katz* decision. In *United States* v. *Holmes,* 521 F. 2d 859 (5th Cir. 1975), the Court required that the government official have a *right* to be in the place from which the view of the incriminating evidence is obtained. The *Holmes* court was faced with a warrantless government search of a shed on the defendant's property. The Court began its discussion by repeating an early Supreme Court admonishment that applies with equal force to the search of Petitioner's farm:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *Id.,* at 866, citing from *Boyd* v. *United States,* 116 U. S. at 635.

In regard to the search of the shed, the Court held that where the government agent had trespassed upon defendant's rural property and peered into a hole in the shed for the sole purpose of securing evidence of a crime, the agent's action was an unlawful search and seizure and did *not* fall within the open field exception to the warrant requirement. 521 U. S. at 870.

Unlike the Petitioner herein, the landowner in *Holmes* did not post "No Trespassing" signs, did not erect any fences or gates, and did not call to the agents

to "come back." Yet, the Court found that a reasonable expectation of privacy had been exhibited simply because of the secluded character of the land searched. A dweller in a rural area, the Court stated, whose property is surrounded by dense growth need not anticipate government agents crawling through the underbrush:

> The government would have us ignore the character of the *Moody* property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, *a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away.* [Emphasis added. *Id.*, at 870.]

The Petitioner in this case, then, clearly exhibited his expectation of privacy. The character of his land was similarly, if not more, densely wooded and secluded, and, in addition, he posted his land, locked a gate, fenced the land, *and,* the unwanted intruders were told to leave.

The defendant's attempts to secure the area in question were determinative of his exhibited expectation of privacy, the Court held in *United States* v. *Dunn,* 674 F. 2d 1093 (5th Cir. 1982). In *Dunn* the police officers had crossed several fences before reaching the defendant's barn, into which they peered. The barn in *Dunn* was within the "curtilage," but the defendant's clear desire for privacy was held to be the decisive factor.

The Court noted that, while property concepts alone were no longer satisfactory for Fourth Amendment analysis, these distinctions were helpful in determining the reasonableness of the defendant's expectation of privacy. *Id.*, at 1100. The search was held to be violative of the Fourth Amendment, because the officers acted without a warrant and without exigent circumstances. The Court described the area searched and the area described closely resembles the area searched on Petitioner's farm, in terms of its secluded nature and the barricades erected to keep out intruders:

> The residence and the other buildings are in a small clearing almost entirely surrounded by trees. The house and the barns are not visible from the perimeter fence. There are interior fences, including one around the residence and one around the subject barn. Once inside the perimeter fence, it is necessary to penetrate at least one more fence before reaching the place where the officers stood while examining the interior of the barn. *Id.*, at 1099.

The Court referred to Justice Brandeis' dissent to the *Olmstead* decision to explain the basis for its analysis. Justice Brandeis' dissent, the Court noted, provides a modern perspective of the intent of the framers of the Fourth Amendment:

> They conferred, as against the Government, the *right to be left alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the indi-

> vidual, whatever the means employed, must be deemed a violation of the Fourth Amendment. 674 F. 2d at 1098, f.n. 10.

In light of the measures taken by the Petitioner to exclude the public and the State Police from his farm, the Police intrusion was unjustified, and violative of the Fourth Amendment.

In *United States* v. *Taborda*, 635 F. 2d 131 (2d Cir. 1980) the Second Circuit applied the *Katz* test, explained it, and determined that the use of "enhanced viewing," such as telescopes, etc., violated the defendant's right to privacy, even if the viewing took place from an area at which the observer had a right to be. The Court discussed the *Katz* test as follows:

> We take the first factor to mean in essence that the defendant must have acted in such a way that it would have been reasonable for him to expect that he would not be observed;

and the second factor;

> requires that the action occur in a place in which society is prepared, because of its code of values and its notion of custom and civility, to give deference to a manifested expectation of privacy. *Id.*, at 137.

It cannot be disputed that the actions of the Petitioner in placing a locked gate on his drive, posting the property with "No Trespassing" signs, and living with his family on the land in question exhibited an expectation of privacy. Surely society's "code of values"

and "notion of custom and civility" have not been so eroded as to permit the government to ignore the manifest expression of a property owner's desire for privacy on his own land.

Air Pollution Variance Board v. *Western Alfalfa* and *Hester* v. *United States* were relied upon by the Tenth Circuit Court of Appeals in *Patterson* v. *National Transportation Safety Board,* 638 F. 2d 144 (10th Cir. 1980). The Court in *Patterson* held that, because the public had not been excluded from viewing what the government agent had viewed, the search was valid. *Id.,* at 146.

Even prior to this Court's decision in *Western Alfalfa* the Ninth Circuit in *United States* v. *Pruitt,* 464 F. 2d 494 (9th Cir. 1972) based its Fourth Amendment analysis on the question of whether, according to *Katz,* the defendant had exhibited a justified expectation of privacy by excluding the public from the area in dispute. The Court found that the area had *not* been excluded from public view because; ". . . any casual passerby would feel perfectly free to ascertain what it was he had found." *Id.,* at 496.

In this case it is clear that no "casual passerby" would have ignored vocal warnings to leave the property, "No Trespassing" signs, a locked gate, and more than a mile of densely wooded forest to view the secluded fields of the Petitioner. The *Katz* standard is the law, and Petitioner's actions in preserving his reasonable expectation of privacy entitle him to the protection of that law.

In *United States* v. *Freie*, 545 F. 2d 1217 (9th Cir. 1976), the Ninth Circuit Court of Appeals outlined the modern history of the open fields doctrine. In *Freie* the defendant had exhibited no reasonable expectation of privacy, and the search of an open area exposed to the public, near a parking spot on an airstrip to which any casual passerby would have access, was not violative of the Fourth Amendment. The Court based its decision on the *Katz* analysis that the Fourth Amendment protects people and not places, and that "the proper focus is no longer on common law property concepts," *Id.*, at 1223. The Court concluded:

> It now appears that *Hester* has no longer any independent meaning but merely indicates that open fields are not areas in which one traditionally might expect privacy. *Id.*, at 1223, citing *United States* v. *Magana*, 512 F. 2d 1169, 1170 (9th Cir. 1975); *Patler* v. *Slayton*, 503 F. 2d 472, 478 (4th Cir. 1974).

The Petitioner's farm land in this case was clearly not an "open field" for the purpose of post-*Katz* Fourth Amendment analysis. As *Hester* no longer has any meaning independent of *Katz*, this Court is urged to consider the expectation of privacy exhibited by the Petitioner.

Petitioner does not challenge the validity of the modified open fields doctrine when the land in question is in fact "open" to the public or is exposed to plain view. However, as here, when an area is neither

exposed to nor open to the public, it is not an open field, but, rather, an area in which the owner maintains a reasonable expectation of privacy.

In this case, the District Court found, and properly so, that the area trespassed upon and searched by the State Police was not an open field since it was totally secluded from the public by means of "No Trespassing" signs, a locked gate, and more than a mile of wooded forest. In addition, and as irrebuttable evidence of Petitioner's express manifestation of a "reasonable expectation of privacy," the State Police were *told to leave the property.* The field in question could not be seen from any point of public access. Simply stated, Petitioner possessed and exhibited a subjective and reasonable expectation of privacy in his farm land.

IV. Decisions From the United States District Courts and the State Courts of Appeal Have Modified or Limited the Application of the Open Fields Doctrine to Cases in Which the Area Searched Was Open to the Public and in Which the Individual Did Not Exhibit a Reasonable Expectation of Privacy.

The United States District Courts have consistently held that the open fields exception is not available where the warrantless search was conducted in an area from which the public was excluded. These courts have interpreted *Hester* as having been altered by *Katz.* The expectation of privacy exhibited by a landowner who fences and posts his land is, they seem to agree, one which, according to *Katz,* society is prepared to accept as reasonable.

In *Dow Chemical Co.* v. *U.S. By and Through Gorsuch*, 536 F. Supp. 1355 (E.D. Mich. 1982), the court rejected the Environmental Protection Agency's open field argument, holding that the exception did not apply to the warrantless high-powered photography of various parts of the Dow plant which were not otherwise exposed to the public. *Id.*, at 1372.

The court emphasized that citizens should not be forced to take unreasonable steps to protect their privacy interest guaranteed by the Fourth Amendment. Reasonable precautions, the court noted, are sufficient to entitle the citizen to Fourth Amendment protection:

> The Fourth Amendment should not be read as to require the citizens or businesses of this nation to take unreasonable measures to protect themselves from surreptitious governmental searches. This Court is not prepared to conclude that Dow must build a dome over its entire plant before it can be said to have manifested or exhibited an expectation of privacy. [Citation omitted.] Rather, what Dow "seeks to preserve as private", and then takes reasonable precautions to safeguard, is entitled to the protection of the Fourth Amendment. *Katz* v. *United States, supra. Id.*, at 1365.

Similarly, no farmer should be required to do more than did the Petitioner to secure his privacy. It should be kept in mind that, without a warrant, the Kentucky State Police were unlawfully trespassing and searching on Petitioner's highly secured farm. The government does *not* contend that the State Police had probable

cause for the warrantless search, or that, if they did have such cause, there were exigent circumstances that would excuse getting a search warrant. [Pet. App. 32, f.n. 1.]

The *Dow Chemical* court commented that,

> We should not require a person or corporation to take unreasonable precautions *to prevent another from doing that which he ought not to do in the first place. Id.*, at 1366. [Emphasis added.]

The defendants in *United States* v. *Balsamo*, 468 F. Supp. 1362 (D. Maine 1979) argued that police officers' entry into a certain wooded area violated their Fourth Amendment rights. The court, citing *Katz*, found that the defendants did not enjoy a legitimate or reasonable expectation of privacy in the area searched because, among other things, the defendants had not erected fences or "No Trespassing" signs around that area. 468 F. Supp. at 1379. In this case, all of Petitioner's farm was fenced or posted, and the State Police encountered five "No Trespassing" signs and a locked gate. [J.A. 16, 26.] (See, also, *United States* v. *Berkshire Beagle Club*, Slip. Op. M.B.D. No. 80-24-F (D. Mass., August 5, 1981); and *United States* v. *F.M.C. Corp.*, 428 F. Supp. 615 (W.D. N.Y. 1977).

On May 24, 1982, this Court granted certiorari in the case of *Florida* v. *Brady*, 406 So. 2d 1093 (Fla. Sup. Ct. 1981), No. 81-1636, for a consideration of this open fields question. In *Brady* the police officers crossed a dike, rammed through a gate, cut the chain lock on another gate, cut or crossed posted fences, and

proceeded several hundred feet to their observation posts deep into private property. The Supreme Court of Florida held that the warrantless search violated the Fourth Amendment. The Court insisted that fences and locked gates are plain evidence of the owner's expectation of privacy, under *Katz*. *Id.*, at 1095.

In this case, the Petitioner's expectation of privacy was exhibited, and justified. As Judge Keith noted in his dissent to the Sixth Circuit en banc opinion below, "*virtually every court which has considered the issue* has held that the open fields doctrine is not a per se rule sanctioning all warrantless searches outside the curtilage:"

> See e.g., *Wilson*, 620 F. 2d 1201 (7th Cir. 1980); *Miller*, 589 F. 2d 1134; *Patler*, 503 F. 2d 472; *Lace*, Slip. Op. No. 81-1098; *Western Alfalfa*, 416 U. S. 861; *Edmonds*, 611 F. 2d 1386; *Patterson*, 638 F. 2d 144; *Pruitt*, 464 F. 2d 494; *Freie*, 545 F. 2d 1217; *United States* v. *Jackson*, 588 F. 2d 1046, 1053 n. 12 (5th Cir. 1979); *Ramapuram*, 632 F. 2d 1149; *Van Dyke*, 643 F. 2d 992; *DeBacker*, 493 F. Supp. 1078; *United States* v. *Noe*, 494 F. Supp. 1032 (E.D. Ky. 1980); *Balsamo*, 468 F. Supp. 1363; *Heer*, 406 F. Supp. 609; *Berkshire Beagle Club*, Slip Op. M.B.D. No. 80-24-F; *FMC Corporation*, 428 F. Supp. 615; *Byers*, 359 So. 2d 84; *Brady*, 406 So. 2d 1093; *State of Nebraska* v. *Camper*, 209 Neb. 376, 307 N. W. 2d 820 (Neb. Sup. Ct. 1981); *State of Tennessee* v. *Lakin*, 588 S. W. 2d 544 (Tenn. Sup. Ct. 1979); *State* v. *Stanton*, 490 P. 2d 1274 (Or. App. 1971); *State of New Mexico* v.

Chort, 91 N.M. 584, 577 P. 2d 892 (N.M. App. 1978); *People of Colorado* v. *McClaugherty,* 566 P. 2d 361 (Colo. Sup. Ct. 1977); *State of Iowa* v. Bakker, 262 N. W. 2d 538 (Iowa Sup. Ct. 1977); *State of Hawaii* v. *Stachler,* 570 F. 2d 1323 (Hawaii Sup. Ct. 1977); *Phelan* v. *The Superior Court of Mariposh County,* 90 C.A. 3d 1005 (Cal. App. 1979); *People of the State of Illinois* v. *Dasenbrock,* 96 Ill. App. 3d 625 (Ill. App. 1981); *Gaylord* v. *State of Arkansas,* 613 S. W. 2d 409 (Ark. App. 1981). *Giddens* v. *State of Georgia,* 156 Ga. App. 258, 274 S. E. 2d 595 (Ga. App. 1980), cert. denied, 101 S. Ct. 1733 (1981). [Pet. App. 64, 65.]

The government's sole attempted justification for the unlawful search of Petitioner's farm is based upon the open fields doctrine which has been modified, discredited, or overruled by this United States Supreme Court, the United States Courts of Appeal, the United States District Courts, and by the courts of appeal of the states. The search and seizure was clearly unlawful under the modern open fields doctrine which requires the determination of Petitioner's reasonable expectation of privacy under *Katz* v. *United States.*

CONCLUSION

The Decision of the Sixth Circuit Court of Appeals Reversing Its Decision Affirming the District Court's Suppression of the Evidence Obtained by the Unlawful Search and Seizure Should Be Reversed.

The Sixth Circuit Court of Appeals, in reversing its decision suppressing the evidence obtained through

the warrantless search of Petitioner's farm, denied Petitioner the right to be protected against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution.

The analysis developed by this Court in *Hester* v. *United States, Katz* v. *United States, Air Pollution Varriance Board* v. *Western Alfalfa,* and *Marshall* v. *Barlow's, Inc.,* requires that the area in question be not exposed to the public, and that the person claiming Fourth Amendment protection exhibit a reasonable expectation of privacy in the area from which the public is excluded. The expectation of privacy must be one which society is prepared to accept as reasonable.

In this case the Kentucky State Police entered Petitioner's private property without a warrant and on the basis of an anonymous tip. The State Police ignored "No Trespassing" signs posted by the Petitioner, and drove several hundred yards on Petitioner's private gravel drive. The State Police encountered a posted and locked gate, and proceeded around this gate. The State Police ignored a verbal request to leave the property. The State Police trespassed one mile into Petitioner's property to the area in question. This area was not visible from the Cumberland River, which flows beside it, nor from the locked and posted gate, nor from the public roadway. Petitioner submits that society is prepared to accept an expectation of privacy in this area from which the Petitioner had excluded the public and in which he had exhibited his reasonable expectation of privacy. Petitioner also submits that

society is not prepared to accept the unlawful and unnecessary actions of the State Police in this case.

For the reasons hereinabove stated, the Petitioner respectfully requests this Honorable Court to reverse the decision of the Sixth Circuit Court of Appeals which reversed its earlier decision affirming the suppression by the District Court of the evidence obtained in violation of the Fourth Amendment to the United States Constitution.

Respectfully submitted.

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No. 82-15

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the warrantless entry by police onto petitioner's fenced and posted field by way of an unobstructed footpath violated the Fourth Amendment.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 31-66) is reported at 686 F.2d 356. The opinion of the panel (Pet. App. 25-30) is reported at 657 F.2d 85. The opinion of the district court (Pet. App. 21-24) is not reported.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 67) was entered on May 5, 1982. The petition for a writ of certiorari was filed on July 2, 1982, and was granted on January 24, 1983. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Kentucky for manufacturing marijuana, in violation of 21 U.S.C. 841(a). Prior to trial, he moved to suppress evidence obtained from a warrantless search of his property, and the district court granted the motion (Pet. App. 21-24). A panel of the court of appeals affirmed (*id.* at 25-30). The full court subsequently granted the government's petition for rehearing en banc and reversed the suppression order (*id.* at 31-66).

1. The evidence adduced at the suppression hearing established that on July 18, 1980, an anonymous informant advised a Kentucky state police officer that petitioner was growing marijuana on his farm. The officer had heard other reports in the community to the effect that petitioner was engaged in some kind of questionable activity on his farm, so the officer, joined by a second detective, drove to petitioner's farm to investigate (J.A. 2-3).

When the officers arrived at the farm, they drove down a road past petitioner's house to a point about three-quarters of a mile from the house at which they encountered a locked gate with a "No Trespassing" sign. While the gate precluded vehicular access, there was no fence at one end of the gate, and there was a path around the gate at that point, which the officers followed (J.A. 3, 5, 16, 22, 23). They had walked several hundred yards along the road on the other side of the gate when they heard someone yelling at them from a distance that there was no hunting allowed. They announced that they were police officers and walked towards the place where they had

heard the person shouting at them. When they arrived there, however, they did not find anyone (J.A. 3-4). The officers then returned to the road, walked some distance farther down the road, and discovered a large field full of marijuana (J.A. 4). The officers subsequently arrested petitioner for manufacturing a controlled substance, and, after further inquiries by the officers prompted by a neighbor's statement, petitioner eventually led them to a second marijuana field (J.A. 10-11). The fields had allegedly been leased by petitioner to two other persons for six months (J.A. 9, 32-35).

2. The district court suppressed the evidence of the discovery of the marijuana (Pet. App. 21-24). The court noted that the gate across the road was locked, that the property was posted with "No Trespassing" signs, and that the fields where the marijuana was located were in a secluded part of the farm (*id.* at 22).[1] On the basis of these factors, the district court concluded that petitioner had a reasonable expectation of privacy in the area where the marijuana was discovered and that, because the officers had entered that area without a warrant, the discovery of the marijuana would not be admissible at trial.

A panel of the court of appeals affirmed the suppression order (Pet. App. 25-30). The panel noted that under the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), warrantless

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[1] The testimony at the suppression hearing indicated that a row of trees obscured the view of the field from a barn on petitioner's property (J.A. 30-31). The detective testified that the field where the marijuana was found was visible from the gate, but that it was not possible to determine from that distance that it was marijuana growing in the field (J.A. 16).

searches are permitted of any area outside private residences and the "curtilage" around those residences and that the field searched here was not within the curtilage (Pet. App. 27-28). The panel concluded, however, that the *Hester* decision had been undercut by this Court's subsequent decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which held that Fourth Amendment rights generally turn on the presence of a legitimate expectation of privacy, not on distinctions in property concepts (Pet. App. 28). On the facts of this case, the panel held, petitioner had a reasonable expectation of privacy in the field where the marijuana was growing because the field was located on the other side of a locked gate marked with "No Trespassing" signs (*id.* at 28-29). Because the Sixth Circuit's prior decision in *United States* v. *Hassell*, 336 F.2d 684 (1964), cert. denied, 380 U.S. 965 (1965), relied on the *Hester* "open fields" doctrine, the panel declared that *Hassell* is "no longer the law of this circuit" (Pet. App. 30).

3. On rehearing en banc, a majority of the full court disagreed with the panel's conclusion that *Hester* had been undercut by *Katz*. The court noted that while this Court had been called upon in *Katz* to apply the Fourth Amendment to circumstances—the monitoring of a telephone conversation—"that could not have been contemplated at the time the Amendment was formulated and adopted," the open fields doctrine of *Hester* simply made a distinction that was " 'as old as the common law' " (Pet. App. 34-35). The court also observed that there were indications in the *Katz* opinion itself that the *Hester* doctrine was still considered valid (*id.* at 35-36), and that this Court had on several occasions since *Katz* referred to *Hester* without ever suggest-

ing that its principles had been diluted (*id.* at 37). The court explained that the requirements of the Fourth Amendment did not apply here because "[t]he human relations that create the need for privacy do not ordinarily take place in [an open field]" (*id.* at 38). The court concluded that any expectation of privacy that a property owner might have in his open field was, as a matter of law, not one that society is prepared to recognize as reasonable (*id.* at 36).

Chief Judge Edwards and Judges Keith, Lively, and Jones dissented (Pet. App. 38-65), contending that the open fields doctrine of *Hester* applies only to areas from which the public is not excluded or to an object or activity that is exposed to public view (*id.* at 52-53). Because they concluded that petitioner had taken measures to exclude the public from his property that gave rise to a reasonable expectation of privacy, the dissenters expressed the view that the open fields doctrine did not permit the entry onto petitioner's field (*id.* at 60-65). The dissenters added that adherence to their view would not unduly hamper law enforcement because police lawfully could have used helicopters to observe the marijuana from the air (*id.* at 63-64). Judge Lively wrote separately to express his view that this case did not involve an "open field" at all within the meaning of *Hester* (*id.* at 66).

SUMMARY OF ARGUMENT

A. In *Hester* v. *United States*, 265 U.S. 57, 59 (1924), this Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." This rule was not undermined by this Court's decision in *Katz* v. *United*

States, 389 U.S. 347 (1967), which held that warrantless wiretapping of a public telephone violated an individual's legitimate expectation of privacy. To the contrary, this Court cited *Hester* with approval in *Katz* itself, and has done so in subsequent decisions. This is because the *property* interest that a landowner has in his field is not equivalent to a *privacy* interest that gives rise to Fourth Amendment protection. Apart from the curtilage surrounding a residence, an individual does not have an expectation of privacy that society is prepared to recognize as "reasonable" in an open field.

B. Posting and fencing an open field does not necessarily alter its character so as to create a protected Fourth Amendment privacy interest in the field. While posting a fence puts an outsider on notice that he is about to commit a trespass, the facts of *Hester* make clear that the "open fields" doctrine is based on the lack of privacy expectation in the field and does not depend on whether or not the police officer is aware that he is trespassing. The posting of "No Trespassing" signs, as a practical matter, gives a landowner little assurance that outsiders will not enter his property; indeed, state statutes typically give law enforcement officials, such as game wardens, specific authority to enter private posted lands to monitor compliance with state wildlife laws. See, *e.g.*, Ky. Rev. Stat. Ann. §§ 149.090, 150.090 (Bobbs-Merrill repl. 1980 & 1982 Cum. Supp.).

Nor does the existence of a fence surrounding an open field necessarily increase the expectation of privacy in that field. Fences around large areas of rural property are usually designed to mark a boundary or to keep animals in rather than to keep people out, and they pose little impediment to entry by a person. Like posting, the existence of such a fence does not

give a landowner a reasonable assurance that outsiders will not enter onto his land. Accordingly, the courts generally have held that there is no protected Fourth Amendment privacy interest in a field that is surrounded by a nonexclusionary fence.

In the circumstances of this case, it is clear that petitioner, by erecting a "No Trespassing" sign and a gate across the road, did not convert his open field into an area protected by the Fourth Amendment. First, because petitioner leased his fields to other persons and relinquished full control over them, he plainly had no expectation that persons unknown to him would not enter past the sign and gate as invitees of the lessee. Moreover, it is undisputed that the gate blocked only vehicular passage, and there was no physical impediment to entry by foot; indeed, the officers entered on a well-traveled footpath. Thus, the only basis for petitioner, or even the lessees, to claim that the open field was converted into an area protected by the Fourth Amendment is the notice of entry onto private property provided by the posted signs. That is an insufficient basis for a landowner reasonably to expect that no outsider will enter his field. Since *Hester* and *Katz* plainly establish that the fact of ownership itself does not create a protected Fourth Amendment interest in a field, the officers' entry onto petitioner's field was constitutional.

C. A landowner may take more substantial measures to exclude outsiders from his field, such as erecting a barrier effectively designed to prevent entry by other persons. Arguably, such action would give him a reasonable expectation of some degree of privacy in the field. Even so (or even assuming that petitioner's contention is accepted that mere posting of a field gives rise to a legitimate expectation of privacy), that expectation of privacy is a limited one

that does not approach the privacy interest that an individual has in his home or office, or even such areas of concededly reduced privacy as his automobile. Even a field surrounded by an exclusionary fence is subject to observation from the air and thus cannot be regarded as wholly private. More important, if the police are mistaken in their suspicion of criminal activity, their unjustified entry onto the field is at most a minimal disruption of an individual's privacy; the officers will observe only what is ordinarily found in a field, such as cornstalks and cows. On the other hand, when police enter a home, they intrude into the area that people reserve for their most personal and private matters.

The "reasonableness" of a search or a seizure under the Fourth Amendment is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted). Because of the magnitude of the privacy invasion involved in a search of a home, this Court has concluded that the Fourth Amendment establishes two prerequisites to sustain the reasonableness of such a search: (1) the substantive standard for balancing societal law enforcement against individual privacy interests is probable cause; (2) as a procedural protection to minimize the risk of a mistake, probable cause is to be determined by a neutral and detached magistrate. In the case of an entry onto a field, where any privacy intrusion is so greatly diminished, it is reasonable that the prerequisites to such an entry be more relaxed, as the Court has recognized in other contexts where there is a substantially reduced privacy intrusion. For example, the warrant requirement does not apply to a search of an automobile,

which is an area of reduced privacy expectation. See *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977). And police may effect brief investigatory detentions on suspicion that does not amount to probable cause. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968). In a situation where police have reason to suspect that evidence of criminal activity will be found in a field—even one in which the landowner has taken effective measures to prevent entry by outsiders arguably justifying recognition of some degree of privacy interest—it is "reasonable" within the meaning of the Fourth Amendment to enter the field on the basis of a reasonable suspicion of criminal activity, given the comparatively minor privacy intrusion entailed in the entry. Thus, even assuming arguendo that petitioner had some legitimate expectation of privacy in his field, the officers' entry was constitutional because it was based on information that gave them a reasonable suspicion that criminal activity was afoot.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE A WARRANT BASED UPON PROBABLE CAUSE AS A PRECONDITION TO ENTRY ONTO A FIELD

A. The Open Fields Doctrine Retains Its Vitality Today

The "open fields" doctrine was first enunciated by this Court in *Hester* v. *United States*, 265 U.S. 57 (1924). In that case, two revenue officers entered onto the defendant's property and, from a distance of 50-100 yards from his house, saw the defendant hand another person what appeared to be a gallon jug of illicitly distilled whiskey. The Court held, in a unanimous decision authored by Justice Holmes, that the fact that the officers had trespassed on the defendant's property was not a reason for suppressing the observations made by the officers. The Court explained

(265 U.S. at 59): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

While the Court's opinion in *Hester* is conclusory, it has become the source of a well-entrenched rule of law, *viz.*, that the open areas beyond the house and its "curtilage" are not within those areas protected by the Fourth Amendment.[2] This rule is soundly based in the specific language of the Fourth Amendment and its limited proscription of only those searches and seizures that are "unreasonable."

Petitioner contends (Br. 14-20) that this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), "complete[ly] discredit[ed]" (Br. 17) the open fields doctrine of *Hester*. But there is nothing in *Katz* to suggest repudiation of the basic prin-

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[2] The curtilage is an area surrounding the house that is habitually used for family purposes and hence is of heightened privacy interest. See *Black's Law Dictionary* 346 (5th ed. 1979). In the urban setting, for example, a fenced yard appurtenant to the house excluding outsiders would generally be considered curtilage. See, *e.g.*, *United States* v. *Martino*, 664 F.2d 860, 879 (2d Cir. 1981) (Oakes, J., concurring); *Hobson* v. *United States*, 226 F.2d 890, 894 (8th Cir. 1955). The common law recognized that the curtilage was to be treated as a part of the house for some purposes (see 4 W. Blackstone, *Commentaries*, ch. 16, at 225 (Univ. of Chicago Press ed. 1979)), and the Court in *Hester* cited to this common law rule. 265 U.S. at 59. Accordingly, it has been recognized that the open fields doctrine does not permit warrantless searches of the curtilage, where the homeowner is considered to have a legitimate expectation of privacy. See, *e.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 993 (4th Cir. 1981); *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956).

ciple of the open fields doctrine. In *Katz*, the Court simply held that the Fourth Amendment protected private conversations conducted in a public telephone booth against warrantless wiretapping. To be sure, *Katz* recognizes that the Fourth Amendment may extend to an area that is not within the curtilage of a privately-owned building, but it does so in the specific context of electronic surveillance of a private telephone conversation; it certainly does not suggest extension of Fourth Amendment protection to an open area like a field,[3] even if an individual may prefer that his activity there remain private.[4]

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[3] The Court in *Katz* noted that the issue involved there, because of significant scientific advances in the area of electronic surveillance and "the vital role that the public telephone has come to play in private communication," was one that could not specifically have been contemplated by the Framers or even by the Court in earlier years. See 389 U.S. at 352; *id.* at 362 (Harlan, J., concurring). As the court below noted (Pet. App. 34-35), no comparable technological advance provides any basis for affording a greater degree of Fourth Amendment protection to a field today than at the time *Hester* was decided or when the Fourth Amendment protection of "persons, houses, papers, and effects" was first enacted.

[4] To buttress his contention that *Katz* discredited *Hester*, petitioner adopts (Br. 15-19) the dissent's premise (see Pet. App. 44-47) that the open fields doctrine is actually based on this Court's decision in *Olmstead* v. *United States*, 277 U.S. 438 (1928), which was expressly overruled by *Katz*. This premise is false. The unremarkable declaration of the Court in *Hester* that the special protection of the Fourth Amendment "is not extended to the open fields" (265 U.S. at 59) did not rest on the subsequent establishment of a much more general, and controversial, rule in *Olmstead* holding that the Fourth Amendment protects only against physical invasions of certain areas. That is quite clear from the decisions themselves. *Hester* was a unanimous decision; *Olmstead*, decided

Indeed, both the majority opinion in *Katz* and Justice Harlan's oft-cited concurring opinion, each of which is relied upon by petitioner (Br. 18-19) and by the dissent below (Pet. App. 48-50), discuss *Hester* approvingly. Citing *Hester*, the Court noted in *Katz* that "[i]t appears to be common ground * * * that an open field is not [an area protected by the Fourth Amendment]." 389 U.S. at 351 n.8. Justice Harlan stated that a "telephone booth is an area where, like a home, * * * and *unlike a field* [citing *Hester*], a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (emphasis added). See also *id.* at 361. Moreover, since *Katz* this Court has relied on *Hester* and consistently cited it approvingly in other decisions. See *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865-866 (1974); see also *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 6, 9; *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977); *United States* v. *Santana*, 427 U.S. 38, 42 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433, 450 (1973); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 393 n.6 (1971).

An examination of the reasoning of *Katz* also makes clear that it casts no doubt on the continuing vitality of *Hester*. *Katz* holds that the Fourth Amendment

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only four years later, was a 5-4 decision so controversial that it prompted each of the dissenters to write separately. Three of the dissenters had joined the Court's decision in *Hester*, including Justice Holmes, its author, and none saw any reason to repudiate their previous decision in the course of their dissents in *Olmstead*. Hence, *Katz*'s overruling of *Olmstead*—in the same wiretapping context in which *Olmstead* was handed down—casts no doubt on the validity of the distinct, and independent, open fields doctrine of *Hester*.

protects areas where an individual has a "justifiabl[e]" expectation of privacy. 389 U.S. at 353. Justice Harlan's concurring opinion amplifies this concept by suggesting a two-part inquiry to determine whether an area is protected by the Fourth Amendment (389 U.S. at 361)—whether the individual, by his conduct, has exhibited a subjective expectation of privacy; and whether that expectation is "one that society is prepared to recognize as 'reasonable' "—and the Court generally has adopted this formulation as embodying the *Katz* rationale. See *United States* v. *Knotts*, *supra*, slip op. 4-5; *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. The Court's holding in *Hester*, in terms of the *Katz* analysis, is simply that society does not recognize as reasonable an expectation of privacy in open fields, and nothing in *Katz* suggests that a different rule should apply.

Thus, the courts of appeals generally have recognized that *Hester* retains its force after *Katz* as standing for the general proposition that an individual ordinarily does not have a legitimate expectation of privacy—in particular, one that implicates the protections of the Warrant Clause of the Fourth Amendment—in an open field. In the words of the Ninth Circuit, *Hester* indicates that "open fields are not areas in which one traditionally might reasonably expect privacy." *United States* v. *Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). Thus, the court in *Freie* held that, even if the owners had subjective expectations of privacy in their private field surrounded by a fence, "those expectations were not objectively reasonable." *Ibid.* See also *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979);

Patler v. *Slayton*, 503 F.2d 472, 478 (4th Cir. 1974); S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968), quoted in *United States* v. *Paul*, 614 F.2d 115, 119 (6th Cir.) (Phillips, J., concurring), cert. denied, 446 U.S. 941 (1980) (post-*Katz* discussion of federal wiretapping statute noting that expectation of privacy in an open field is "clearly unjustified").

It is true, of course, that unconsented entry onto open fields often violates the landowner's *property* rights. But *Hester* undeniably stands for the proposition that a legal property interest is not necessarily equivalent to an interest protected by the Fourth Amendment, and the Court has consistently adhered to this view. See generally *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. This principle was not challenged in *Katz;* indeed, it is *Katz* that emphasizes that the Fourth Amendment focuses on legitimate privacy interests and is not coextensive with property rights. See 389 U.S. at 351-353; see also *Payton* v. *New York*, 445 U.S. 573, 591 n.33 (1980); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 151 (Powell, J., concurring).

Thus, it is ironic, to say the least, that primary reliance is placed upon *Katz* to argue that the Warrant Clause protects open fields by virtue of an individual's ownership of those fields. The fact that *Katz* recognized the existence of a legitimate expectation of privacy in a public place because of the peculiarly private nature of the activity—a phone conversation—does not vitiate *Hester* in any way. To the contrary, *Katz* buttresses the rationale of the open fields doctrine, namely, that an individual may lack a legitimate expectation of privacy in an area like a field, where private activities do not ordinarily take place, even if the field is private property.

It is also undoubtedly true that an individual may have a strong subjective expectation of privacy in activity he carries on in an open field, depending on the distance of the field from areas frequented by the public and the nature of the terrain (cf. Pet. Br. 23). The probability that another person will observe his activity "in the middle of nowhere" is small. But an individual has an analogous expectation of privacy in activities undertaken late at night in an apparently deserted alley or forest; obviously, however, he can have no constitutional objection if a policeman stumbles upon him when he is engaged in criminal activity. Clearly, then, an expectation of privacy entitled to Fourth Amendment protection cannot be grounded merely on the improbability of being observed. In sum, both before and after *Katz*, there is no basis for recognizing a legitimate expectation of privacy in an open field, and hence there is no reason to modify the traditional open fields doctrine here.[5]

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[5] The conclusion of *Hester* that the Fourth Amendment is not violated when police trespass onto an open field does not suggest that a landowner is powerless to prevent such a trespass. As a practical matter, law enforcement officers likely will enter onto private property only if they have good reason to suspect that criminal activity is afoot. If, however, a landowner is being harassed by unjustified police entry onto his property, he can seek damages or an injunction prohibiting the police from further trespass, in accordance with remedies supplied by state law.

B. The Open Fields Doctrine May Apply To Fields That Are Posted And Fenced

1. *Petitioner's Posting of Signs and Erection of a Gate Did Not Convert His Open Field Into an Area in Which He Had a Legitimate Expectation of Privacy*

Petitioner contends (Br. 20-23), adopting the view of the dissent (Pet. App. 50-53), that, to the extent it survives at all, the open fields doctrine today is quite limited in scope: it permits police to observe objects that are exposed to the public and allows them to conduct a warrantless search only in an area from which the public is not excluded. If an owner of property has manifested in any way that his property is not open to the public, however—for example, by posting a sign—petitioner contends that the police may not enter except with a warrant based upon probable cause, irrespective of the nature of the property and the degree to which the entry can reasonably be expected to infringe upon the individual's privacy. Because petitioner's field was posted and vehicular access blocked by a gate across the road, he contends (Br. 23) that the warrantless police entry here violated the Fourth Amendment. In the words of the dissent, "the public was provided with more than adequate notice that they were not to trespass on [petitioner's] farm"; therefore the search "was not limited to areas of public access" and thus "not within the narrow confines of the Open Fields Doctrine" (Pet. App. 62).

This crabbed version of the open fields doctrine misperceives the principles underlying the Fourth Amendment and, moreover, cannot be squared with the holding in *Hester*. An open field is not subject to the special constitutional protection that extends to "persons, houses, papers, and effects" because it is not an area in which a person ordinarily conducts private

activities or can reasonably expect that activities will remain private. The posting of a field or placing a gate across an access road does not alter that fundamental fact and hence does not magically transform a field into an area protected by the Fourth Amendment.

Turning first to posting, it is uncontested that the officers here walked past a "No Trespassing" sign posted on the gate outside petitioner's field (see J.A. 41), but that fact alone surely did not create a legitimate expectation of privacy in the field. The effect of posting a field is simply to put an individual on notice that he is about to trespass onto private property and to dispel any notion that his entry is welcome. Clearly, a police officer who enters onto posted property has not simply committed an unintentional trespass. But it is evident from *Hester* itself that the open fields doctrine does not apply only to unintentional trespasses. While the opinion in *Hester* does not specify whether the property was fenced or posted, the revenue officers there secreted themselves at a distance of 50-100 yards from the house, which they could hardly have imagined to be public property. Indeed, one of the revenue officers himself testified that he supposed the officers were trespassing on Hester's property. 265 U.S. at 58. Thus, the Court found no Fourth Amendment violation in *Hester* even though the officers were aware that they were trespassing. *Hester* holds that a knowing trespass onto an open field, although perhaps violative of state property law, does not violate the Fourth Amendment because a field is not an area in which there is a legitimate expectation of privacy; the posting of "No Trespassing" signs does not alter that conclusion.

A posted field remains an "open field" because a landowner's announcement of his desire that persons

not enter an open area does not equal an expectation that they will not enter there. To the contrary, landowners generally realize that their open land is liable to be crossed by others who have some reason to do so—for example, if it is a convenient short cut—despite the presence of a "No Trespassing" sign. See, *e.g.*, *United States* v. *Edmonds*, 611 F.2d 1386, 1388 (5th Cir. 1980). Accordingly, a landowner has no reasonable expectation that objects that he leaves in such a field will not be observed by a member of the public.

Moreover, state statutes typically permit access by law enforcement officers to private property under circumstances in which access to enclosed structures would not be allowed. For example, Kentucky law gives conservation officers and all other law enforcement officers "the right to go upon any land of any person or persons whether private or public" for various purposes connected with fish and wildlife research and the enforcement of fish and game laws. Ky. Rev. Stat. Ann. § 150.090 (Bobbs-Merrill repl. 1980). See also Ky. Rev. Stat. Ann. § 149.090 (Bobbs-Merrill repl. 1980 & 1982 Cum. Supp.) (forest wardens authorized to trespass in the course of their duties). This specific authorization is illustrative of a more general recognition that in many situations a law enforcement officer is empowered to enter upon private property in the performance of his duties where an entry by a private party would constitute a trespass. See, *e.g.*, *United States* v. *Knight*, 451 F.2d 275, 278 (5th Cir. 1971), cert. denied, 405 U.S. 965 (1972); *United States* v. *Capps*, 435 F.2d 637, 640 & n.4 (9th Cir. 1970). Thus, a landowner who posts his field can have no reasonable expectation of complete privacy from law enforcement officers.

Apart from the posting of the field, petitioner (Br. 23) and the dissent (Pet. App. 62) rely on the existence of some fences and the fact that the road was blocked by a locked gate to buttress their view that petitioner had a legitimate expectation of privacy in his field. It is apparent for several reasons, however, that the fences and gate did not enhance petitioner's reasonable expectation of privacy in his field.

At the outset, we note that even the existence of a fence completely surrounding rural property does not necessarily give rise to a significant expectation of privacy in a field. Ordinarily the purpose of such a fence is to mark a boundary or to keep farm animals within the property. As one court has noted, such rural fences "are designed more to keep livestock under control than to keep people out." *State* v. *Stanton*, 490 P.2d 1274, 1279 (Or. Ct. App. 1971). See also *United States* v. *Williams*, *supra*, 581 F.2d at 454; *Giddens* v. *State*, 156 Ga. App. 258, 259, 274 S.E.2d 595, 597 (1980), cert. denied, 450 U.S. 1026 (1981). Rural landowners recognize that hunters and other members of the public frequently enter private fields (see *State* v. *Cemper*, 209 Neb. 376, 307 N.W.2d 820, 823 (1981); *State* v. *Stanton*, *supra*, 490 P.2d at 1279)), and that an ordinary livestock fence does not present much of an obstacle to entry by a person (see *Giddens* v. *State*, *supra*, 156 Ga. App. at 259, 274 S.E.2d at 597).[6] Accordingly,

[6] Indeed, in at least two of the reported cases concerning the applicability of the open fields doctrine to a fenced field, law enforcement officers entered the field after the criminal activity was reported to them by members of the public who had trespassed on the property. See *State* v. *Stanton*, *supra* (two teenagers); *State* v. *Byers*, 359 So.2d 84 (La. 1978) (hunter).

while he may hope that persons will be discouraged from trespassing or inadvertently wandering onto his property, a landowner has little expectation that persons who desire to enter his field will be deterred by the presence of a boundary or livestock fence surrounding the entire property any more than they would be by the erection of a "No Trespassing" sign.[7] Significantly, the record in *Hester* makes clear that the officers there crossed a fence in order to reach their vantage point (see Transcript of Record at 16, 19-20, *Hester* v. *United States*, *supra* (No. 243, 1923 Term)), yet the Court still characterized their entry as onto an "open field" in which there was no Fourth Amendment protection.

Recognizing the inevitable limitations on the degree of privacy that reasonably can be expected in an open field, the courts of appeals, both before and after *Katz*, generally have declined to suppress evidence seized in an open field, even where the property is fenced and posted. For example, in *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977), the court held that a fenced goosehouse came within the ambit of the open fields doctrine because the goosehouse was beyond the curtilage and the fence was for the purpose of containing the geese. Significantly, the court dismissed out of hand the relevance of a perimeter fence, finding that most of the 20-acre farm "was clearly open fields" even though

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[7] A fence, depending on its nature, may designate a particular area of a farm as more private, and a fence closely surrounding a residence may be an important factor in defining the curtilage. See, *e.g.*, *United States* v. *Van Dyke*, *supra*, 643 F.2d at 994; *United States* v. *Williams*, *supra*, 581 F.2d at 454. But a boundary fence that surrounds a large farm does not convert all the open areas on the farm into areas protected by the Fourth Amendment.

the entire farm was surrounded by a fence. *Id.* at 1297. See also *United States* v. *Long*, 674 F.2d 848, 852-853 (11th Cir. 1982); *United States* v. *Williams*, *supra*; *United States* v. *Freie*, *supra*; *McDowell* v. *United States*, 383 F.2d 599 (8th Cir. 1967); *Care* v. *United States*, 231 F.2d 22 (10th Cir.), cert. denied, 351 U.S. 932 (1956); *Janney* v. *United States*, 206 F.2d 601 (4th Cir. 1953); *Stark* v. *United States*, 44 F.2d 946 (8th Cir. 1930); but see *United States* v. *Dunn*, 674 F.2d 1093, 1100 (5th Cir. 1982), petition for cert. pending, No. 82-508 (fenced-in barn held within curtilage).[8]

By the same token, several state court decisions have recognized the applicability of the open fields doctrine despite posting or the existence of a fence. See *Luman* v. *State*, 629 P.2d 1275 (Okla. 1981) (barbed wire fence); *DeMontmorency* v. *State*, 401 So. 2d 858 (Fla. Dist. Ct. App. 1981) (officers crossed over gate into wooded area); *State* v. *Cemper*, *supra* (entry through open gate in barbed wire fence); *Giddens* v. *State*, *supra* (barbed wire fence); *People* v. *Lashmett*, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979), cert. denied, 444 U.S. 1081 (1980) (officers climbed over two fences); *Ford* v. *State*, 264 Ark. 141, 142, 569 S.W.2d 105, 106 (1978), cert. denied, 441 U.S. 947 (1979) (posted and fenced field with locked gate); *State* v. *Wren*, 115 Ariz. 257, 564 P.2d 946 (Ct. App. 1977) (barbed wire fence); *Common-*

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[8] Numerous other decisions, not involving fields described as fenced or posted, also recognize the continuing vitality of the *Hester* open fields doctrine after *Katz*. See, *e.g.*, *Patterson* v. *National Transportation Safety Board*, 638 F.2d 144 (10th Cir. 1980); *United States* v. *Ramapuram*, 632 F.2d 1149, 1155 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Basile*, 569 F.2d 1053 (9th Cir. 1978); *Patler* v. *Slayton*, *supra*; *United States* v. *Brown*, 487 F.2d 208, 210 (4th Cir. 1973), cert. denied, 416 U.S. 909 (1974).

wealth v. *Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) (field posted and surrounded by embankments and barbed wire fences); *State* v. *Stanton*, *supra* ("a couple" of livestock fences); *Casey* v. *State*, 87 Nev. 413, 488 P.2d 546 (1971) (fenced ranch); but see *State* v. *Brady*, 406 So. 2d 1093 (Fla. 1981), cert. granted, 456 U.S. 988 (1982) (violation of Fourth Amendment found where officers cut chain lock and rammed through gate); *State* v. *Byers*, 359 So. 2d 84 (La. 1978) (marijuana field held not "open" because posted and road chained). These decisions rest simply on the notion that posting a field or erecting a nonexclusionary perimeter fence does not sufficiently change the nature of a person's expectation of privacy in an open field that it is reasonable to attach a constitutionally protected privacy right to items present or activities carried on in that field.[9]

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[9] Of course, there are areas outside the home that are sufficiently private to warrant Fourth Amendment protection. Thus, the courts have invalidated searches of enclosed structures (see, *e.g.*, *United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975); *Adair* v. *State*, 298 So. 2d 671, 674 (Ala. Crim. App. 1974)) or open areas found to be part of the curtilage (see, *e.g.*, *United States* v. *Van Dyke*, *supra*; *Wattenburg* v. *United States*, 388 F.2d 853, 857-858 (9th Cir. 1968)).

It should be noted that, contrary to petitioner's (Br. 15-20) and amici curiae's (see note 12, *infra*) (ACLU Br. 18-23) suggestion, consideration of the traditional concept of curtilage has not become invalid after *Katz* simply because the concept was used in *Olmstead*. *Katz*, of course, did not completely eliminate for Fourth Amendment purposes the relevance of location. Obviously, the protections of the Fourth Amendment are stronger in the home than in other areas of reduced privacy interest. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980). The curtilage is an area traditionally associated with the home (see note 2, *supra*) and hence entitled to greater protection than a field. Moreover, the concept of curtilage does not embody a "rigid property concept[]" (Pet. Br. 17) or "per se 'locational' theory" (Pet. Br. 18); to the

In any event, it is clear in the circumstances of this case that the gate and fences around petitioner's farm conferred no expectation of privacy on him whatsoever. First, the fields in question were leased by petitioner to two other individuals, while adjoining fields were apparently leased to other persons (J.A. 34). Petitioner himself testified that he had nothing to do with the leased property for the period of the lease and considered it as if it were owned by the lessees (J.A. 34-35). Plainly, petitioner had no expectation whatsoever that persons unknown to him would not enter these fields at the invitation of the lessees and hence no reason to believe that any activities that he carried on in the fields or objects left there would remain private from outsiders. Whatever expectation of privacy theoretically could have been secured by petitioner by posting and fencing the fields did not exist here because his leasing of the fields relinquished his right to select the persons permitted to enter.

Moreover, the gate and fences involved here provided no basis for either petitioner or the lessees to believe that persons would enter the fields by invitation only. While the gate did restrict unauthorized entry by vehicles, it is undisputed that there was no physical impediment to entry by foot. The record unequivocally shows that there was a fence on only one side of the gate and that the officer followed a frequently used path around the end where there was no

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contrary, even before *Katz*, the concept of curtilage in this connection was based on consideration of a multitude of factors that basically were directed at determining whether an area was entitled to some expectation of privacy because of its association with the home. See, *e.g.*, *United States* v. *Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981); *Care* v. *United States*, *supra*, 231 F.2d at 25.

fence (J.A. 16, 22). Thus, the "fencing" of petitioner's fields simply provided notice that it was private property but gave him no additional reason to expect that persons would not enter the fields on foot. Accordingly, any expectation that petitioner or the lessees of the fields could have had that objects in the fields would remain private from outsiders entering on foot rested solely on the notice provided by the "No Trespassing" signs.[10] That is

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[10] Petitioner also suggests (Br. 23) that the "highly secluded" nature of the marijuana fields contributed to his legitimate expectation of privacy. It is true, of course, that the fields were partly secluded in the sense that trees obstructed a view of the fields from a point off petitioner's property in one direction and the marijuana was not discernible at all from off petitioner's property. But that is not dispositive of the question presented here concerning the application of the open fields doctrine, which involves the admissibility of evidence discovered as a result of a technical trespass onto private property. The fields involved here plainly were not secluded from persons who entered petitioner's property on the unobstructed path. Contrary to petitioner's implication (Br. 13) that the officers hacked their way through dense underbrush to reach the marijuana, the record shows that the investigating officers simply walked along the road or path until they discovered the marijuana (J.A. 4-5, 19). Thus, the fields where the marijuana was discovered were just as "open" for the purposes of the open fields doctrine as any other area of petitioner's property beyond the "No Trespassing" sign. To the extent it may be argued that some portion of an open field may enjoy additional Fourth Amendment protection because the topography of the land secludes it from the rest of the field, that question is not presented here.

Petitioner also notes (Br. 23) that the officers were mistaken for hunters and told that no hunting was allowed in the field. This also put the officers on notice that they were on private property, but, given that such notice had already been given by the "No Trespassing" signs, it is of no particular relevance to the question presented. It should be noted,

simply an insufficient basis for treating an open field as a private area for Fourth Amendment purposes—let alone an area of such privacy that police are barred from entering unless they have a warrant based on probable cause.

The courts of appeals consistently have held that measures that serve only to notify an outsider of property rights but pose no actual barrier to entry, such as posting signs, are insufficient to convert an open field into an area protected by the Fourth Amendment. See, *e.g.*, *United States* v. *Hensel*, 699 F.2d 18, 32 (1st Cir. 1983); *United States* v. *Ventling*, 678 F.2d 63, 66 (8th Cir. 1982); *United States* v. *Williams*, *supra*; *McDowell* v. *United States*, *supra*. The cases cited by petitioner and their supporting amici rejecting application of the open fields doctrine (see Pet. Br. 28-38; ACLU Br. 43 n.8) all involved fencing more substantial than that here, which posed at least some impediment to entry; none of those cases recognizes a legitimate expectation of privacy based solely on the hope that all outsiders will abide by a "No Trespassing" sign.[11] Indeed, even some cases

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however, that petitioner's assertion (Br. 5-6) that the officers ignored this warning is contradicted by the record. To the contrary, the officers shouted back that they were not hunters, but police officers, and backtracked to try to speak to the person who had called to them. When they found no one, they proceeded on their way down the road and discovered the marijuana. See J.A. 3-4.

[11] In the case consolidated with this one, *State* v. *Thornton*, 453 A.2d 489 (Me. 1982), cert. granted, No. 82-1273 (Apr. 4, 1983), the court rejected application of the open fields doctrine because of the presence of "No Trespassing" signs and a dilapidated stone wall. While that decision supports petitioner's contention, we regard it as erroneous and urge this Court to reverse it for the same reasons that support affirmance in this case.

that have refused to find the open fields doctrine applicable on their particular facts have suggested that mere posting would be insufficient to confer the protections of the Fourth Amendment on an open field. See, *e.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981). Thus, it is clear that the measures taken by petitioner did not convert his open field into an area in which he had a legitimate expectation of privacy so as to render unconstitutional the officers' warrantless entry onto the field. See Note, *How Open are Open Fields?* United States *v.* Oliver, 14 U. Tol. L. Rev. 133, 159-162 (1982).

2. Petitioner's Ownership of His Open Field Did Not Create a Presumption of a Legitimate Expectation of Privacy

Perhaps recognizing that the erection of a sign does little to alter the character of an open field and thereby make it an area infused with such a privacy interest that probable cause and a warrant is a precondition to entry, amici curiae supporting petitioner take a somewhat different—and more sweeping—approach (see ACLU Br. 24-30).[12] Amici contend (ACLU Br. 29) that "[t]he right of a property owner to exclude others creates a presumptively legitimate expectation of privacy." In other words, despite the lesson of *Katz* that Fourth Amendment rights do not depend on property rights (see page 14, *supra*), amici contend that mere ownership of property automatically confers the full panoply of

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[12] We refer here to the brief as amici curiae filed on behalf of the American Civil Liberties Union of Northern California, the Mexican American Legal Defense and Educational Fund, and California Rural Legal Assistance, which for convenience will be referred to as "ACLU Br."

Fourth Amendment protections upon the owner in every portion of the property, even an open field. Amici continue by explaining (ACLU Br. 29) that "[t]his presumption [of a legitimate expectation of privacy] may properly be defeated only when the property owner has failed to exercise her right to exclude." Amici explain *Hester* on this basis. Since Hester "had not exhibited any intention to keep * * * strangers from his father's land," amici claim (ACLU Br. 12), he "*forfeited* his constitutional protection against unwanted police intrusion" (emphasis added). This approach cannot withstand analysis.

Amici's explanation of the open fields doctrine turns the Fourth Amendment on its head. First, of course, it is simply not correct that a mere ownership interest in property in and of itself creates a legitimate expectation of privacy. While it is true that a property owner's right to exclude others (see ACLU Br. 29) gives him the right to take measures that may create an expectation of privacy, that does not mean that a privacy interest is inherent in the mere fact of ownership of the property. *Katz* itself refutes such a suggestion, and the only authority relied upon by amici for this novel proposition clearly states that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12 (citing, *inter alia*, *Hester*). An individual's legitimate expectation of privacy in an area derives from the reasonableness of his expectation that outsiders will not enter there; there is no basis for such an expectation in an open field.

Second, and more importantly, amici's attempt to harmonize *Hester* with their property-based theory of expectation of privacy is fundamentally flawed.

Indeed, amici's own brief exposes the fallacy of their argument. Amici argue that Hester did at one time have a legitimate expectation of privacy in his open field, but that he forfeited that expectation and its concomitant Fourth Amendment protection because he failed to take any measures to keep strangers off the land (ACLU Br. 12). However, the Fourth Amendment does not require an individual to take affirmative measures to retain constitutional protections that he already has. To quote amici, "[t]he Constitution protects a person's reasonable expectation of privacy; it does not require one to secure it by force" (ACLU Br. 33). Thus, if an individual has a legitimate expectation of privacy in a place, such as his home, he does not forfeit his constitutional protection against unwanted entry if he fails to take a particular action to secure the place, for example, locking the door (cf. ACLU Br. 36). The protections of the Fourth Amendment are not forfeited by inaction; that would "shift to the citizen the onus" (ACLU Br. 33-34) of protecting what the Constitution already protects.[13]

Thus, amici's contention that Hester forfeited his constitutional protection against unwanted entry onto his property because he failed to take measures to

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[13] Of course, an individual may forfeit his legitimate expectation of privacy and concomitant Fourth Amendment protection in an area by taking some affirmative action. For example, the owner of a home surely forfeits his legitimate expectation of privacy in a house or apartment if he rents it to another individual. Similarly, an individual may lose his privacy interest in an article if he abandons it or exposes it to plain view. Hester, however, did none of these things. None of the incriminating evidence found by the police in *Hester* was exposed to anyone who was not trespassing. Cf. ACLU Br. 11-12.

keep outsiders away is untenable. The defect in amici's analysis lies in its faulty premise; Hester *never* had a legitimate expectation of privacy in his open field. Rather, the correct explanation of the holding in *Hester* is the one given by the Court there (265 U.S. at 59): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields." Because Hester had no expectation of privacy in his field and took no exclusionary measures that created one, the officers' entry onto his property did not violate the Fourth Amendment. By the same token, petitioner's posting of "No Trespassing" signs was not a measure that created a reasonable expectation of privacy in his field, and hence the officers' entry was constitutional.[14]

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[14] Amici apparently also suggest (see ACLU Br. 21-23, 27-29, 45-48) that petitioner's field was entitled to special Fourth Amendment protection because it was a form of "commercial premises." This is entirely untenable. The text of the Fourth Amendment actually focuses on private premises ("houses"), not commercial premises. It is true, of course, that commercial premises, such as offices, factories, and warehouses, may be protected by the Fourth Amendment if they are possessed of attributes that confer a legitimate expectation of privacy on an individual—whether or not he is engaged in a commercial enterprise. If anything, however, the protections of the Fourth Amendment apply less stringently to a commercial enterprise than to personal effects. See *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981); *United States* v. *Kaiyo Maru No. 53*, 699 F.2d 989, 995 (9th Cir. 1983). At any rate, an open field used for commercial purposes is no more private than an open field limited to personal use. In particular, amici's contention (ACLU Br. 23 n.5) that petitioner's field was entitled to special constitutional protection because it was used for the illegal commercial purpose of growing marijuana is preposterous.

C. Even Assuming Privately Owned Woods Or Fields Are In Some Circumstances Entitled To Fourth Amendment Protection, A Warrantless Search On The Basis Of Reasonable Suspicion Of Criminal Activity Is Permitted

The fact that an open field is not an area in which a landowner has a legitimate expectation of privacy does not necessarily mean that the character of the land cannot be altered so as to convert the field or a portion of it into an area subject to Fourth Amendment protections. By virtue of his ownership, a landowner has a right to develop his land and make improvements that may give him a legitimate expectation of privacy. Obviously, houses and other buildings stand on what once was an open field, yet they are fully subject to the protections of the Fourth Amendment. Petitioner and the dissent below essentially argue that the mere notification of a desire to exclude outsiders by the erection of a "No Trespassing" sign sufficiently alters the character of an open field to confer a legitimate expectation of privacy upon an individual's activities there. In our view, as argued above (pages 17-18, *supra*), posting a field is too insubstantial a measure to be reasonably expected, as a practical matter, to exclude outsiders from a field, and hence it cannot create a legitimate expectation of privacy in an open field. By contrast, when a landowner takes measures to prevent entry by the public, such as construction of an exclusionary fence, as opposed to the insubstantial livestock fence that usually surrounds a field, it is at least arguable that he has a limited expectation of privacy in the enclosed area. See, *e.g.*, *United States* v. *FMC Corp.*, 428 F. Supp. 615 (W.D.N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978) (eight-foot high fence topped with barbed wire).

This is not to concede that even substantial measures taken to exclude outsiders from entering an open field should implicate the protections of the Fourth Amendment. Although surrounded by an exclusionary fence, a field is still a field—and unmistakably does not become a person, house, paper, or effect. But even assuming that exclusionary measures at some point create a constitutionally protected privacy interest in a field that requires a reasonable justification for an official intrusion, it does not follow that the field should be given the same constitutional protection as a home, an office, or even an automobile. That is, a search of such a field can be reasonable within the meaning of the Fourth Amendment even if not conducted pursuant to a warrant or based on probable cause. Because the privacy interest in a field, even if measures have been taken to exclude outsiders, does not approach the privacy interest in a home, an office, luggage or other containers of personal effects, or a car, a search of that field is a significantly lesser intrusion than a search of traditionally more private areas and correspondingly requires a lesser degree of justification.

Accordingly, if the traditional understanding of the open fields doctrine is to be modified by extending the protections of the Fourth Amendment to an open field where some measures have been taken to prevent entry by outsiders (or, *a fortiori*, if petitioner's contention is accepted that insubstantial exclusionary measures such as posting a "No Trespassing" sign implicate Fourth Amendment protections), we submit that an entry by law enforcement officers onto such a field does not violate the Fourth Amendment if the entry is justified by a reasonable suspicion of criminal activity.

The substantive command of the Fourth Amendment prohibits "unreasonable searches and seizures." In determining whether this "key principle" of reasonableness has been satisfied, the courts must engage in a "balancing of competing interests." *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981), quoting *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). Specifically, the reasonableness of a search or seizure is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted). See also *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967). We submit that the privacy intrusion involved in a search of a field is so limited that, weighed against the government interest in ferreting out suspected criminal activity, such a search is "reasonable" if based on a reasonable suspicion of criminal activity.[15]

First, even a field surrounded by an exclusionary fence is subject to observation from the air and thus cannot be regarded as wholly private.[16] Contrary to

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[15] Where a search invades a substantial privacy interest, it generally is considered reasonable only if conducted in accordance with the Warrant Clause of the Fourth Amendment. See *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977). If, however, a law enforcement action is permitted on the basis of suspicion short of probable cause, then no warrant can be required.

[16] Apart from aerial observation by law enforcement agents, open areas of private property are subject to intentional observation from the air by aircraft owned by private parties, such as traffic helicopters and news media seeking aerial photographs, or inadvertent observation by persons in air-

amici's contention (ACLU Br. 37 n.7), aerial observation by law enforcement agents has consistently been held not to invade an expectation of privacy recognized under the Fourth Amendment.[17] Indeed,

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craft flying over the property on their way to another destination. See, *e.g.*, *United States* v. *DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980).

[17] See, *e.g.*, *United States* v. *Allen*, 675 F.2d 1373, 1380-1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981); *United States* v. *Mullinex*, 508 F. Supp. 512, 514-515 (E.D. Ky. 1980); *United States* v. *DeBacker*, *supra*, 493 F. Supp. at 1081; *Murphy* v. *State*, 413 So. 2d 1268 (Fla. Dist. Ct. App. 1982); *Goehring* v. *State*, 627 S.W.2d 159 (Tex. Crim. App. 1982); *State* v. *Layne*, 623 S.W.2d 629 (Tenn. Crim. App. 1981); *People* v. *Lashmett*, *supra*, 71 Ill. App. 3d at 531, 389 N.E.2d at 890; *State* v. *Stachler*, 58 Hawaii 412, 418-419, 570 P.2d 1323, 1327-1328 (1977); *Dean* v. *Superior Court*, 35 Cal. App. 3d 112, 117-118, 110 Cal. Rptr. 585, 589-590 (1973); cf. *People* v. *Sneed*, 32 Cal. App. 3d 535, 542-543, 108 Cal. Rptr. 146, 150-151 (1973) (helicopter hovering below navigable airspace at height of 20-25 feet held unlawful).

In *Dow Chemical Co.* v. *United States*, 536 F. Supp. 1355 (E.D. Mich. 1982), relied upon by both petitioner (Br. 35-36) and amici (ACLU Br. 38-39 n.7), the court held that the use of aerial photographs contracted for by the Environmental Protection Agency and taken by a private company violated the Fourth Amendment because enlargement of the photographs revealed details of the outside of Dow's Midland, Michigan, plant not visible to the naked eye (the enlargements referred to in the opinion were made by Dow Chemical for purposes of the litigation, not by the government). That case is consistent with the long line of decisions cited above recognizing the constitutionality of aerial observation. The decison is plainly based on the invasion of privacy that the court found present in the use of the photographic equipment and the possibility of enlargement to show detail, and it suggests that an overflight limited to naked eye observation would not violate the Fourth Amendment. See, *e.g.*, 536 F. Supp. at 1367, 1372. In any event, we view the *Dow Chemical* decision as erroneous, and it has been appealed to the Sixth Circuit, No. 82-1811.

even the dissent below recognized (Pet. App. 63-64) that the marijuana fields here could lawfully have been observed by the police from the air. See also Amici Curiae Brief of California Farm Bureau Federation and Florida Farm Bureau Federation in Support of Petitioner at 16. Because the manner of observation is ordinarily of no consequence to the landowner, he has a limited legitimate expectation of preserving the privacy of things freely observable from the air. See Pet. App. 36 n.4; see also *United States* v. *Knotts*, *supra*, slip op. 9.

More important, the intrusion on the landowner's privacy when police enter a field is not even remotely comparable to the intrusion that is involved when police enter a home or business premises or search through private papers. In the case of a search of a private residence or office, if the police are mistaken in their suspicion of criminal activity, they necessarily disrupt an area that people reserve for their most personal and private matters. The exposure of these matters to outsiders is a most severe intrusion into the privacy of the innocent individual. In order to safeguard these important privacy interests against unjustified invasion, the Fourth Amendment interposes two requirements before a home or office can be searched: the substantive requirement that the police have probable cause to believe that evidence of criminal activity will be found and the procedural requirement that this determination be made by a neutral and detached magistrate.

If the police err in invading an open field, however, the consequences are much less severe. The entry is a minimal disruption of an individual's privacy. Exposure to the police of the contents of an open field is relatively unintrusive. In most cases, the consequence is simply that the police observe nothing but a field

and perhaps some cornstalks or cows; an individual is highly unlikely to keep exposed in an open field personal effects that he wishes to keep private. Because the invasion of privacy resulting from an erroneous search is substantially smaller in the case of a field than in the case of a residence, an office, a closed container, or even an automobile, it is reasonable that the Fourth Amendment standard that must be satisfied before a search may occur be less severe.

Suppose, for instance, that the police receive an anonymous tip that a kidnap victim is being held in the woods inside posted and fenced private property or that a cache of automatic weapons is hidden in a wheat field on a large, fenced farm. Or suppose that an EPA inspector receives information that hazardous chemicals are being illegally dumped near a stream running through such property. Such tips afford reasonable suspicion of unlawful activity but are insufficiently substantiated to provide probable cause, without which no warrant can be obtained. While the police could not rely on information of this quality to search a house, reason dictates that the information affords a sufficient basis to undertake a search implicating the comparatively inconsequential privacy interests in a field or woods. Accordingly, a rational balancing of societal and individual interests in such circumstances calls for allowing a search upon a justification that, while concrete and objectively verifiable, is less substantial than is needed to justify official inspection of more private areas.

This Court has recognized in other contexts that the two basic constitutional prerequisites to a search of a residence do not necessarily apply where there is a substantially reduced privacy intrusion. For example,

a search of an automobile is a significantly lesser intrusion than a search of a residence. As the Court explained in *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977), quoting *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion):

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects * * *. It travels public thoroughfares where both its occupants and its contents are in plain view.

As a result, the warrant requirement is thought to be unnecessary to protect adequately the owner's privacy interests in the vehicle's interior. See also *United States* v. *Knotts*, *supra*, slip op. 5; *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 153-155 (Powell, J., concurring); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Even so, it is clear that the likelihood that personal effects will be found in a car (perhaps while in transit to or from a residence)[18] is substantially greater than the likelihood that such personal effects will be found in an open field.

Similarly, seizures that are a minimal intrusion compared to an arrest may be effected on less than probable cause. See, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, 392 U.S. 1 (1968). And in the context of administrative searches, where there is generally a reduced expecta-

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[18] Even if the personal effects are stored in the automobile in a container that indicates that it contains personal effects, they may be exposed by a warrantless search. See *United States* v. *Ross*, 456 U.S. 798 (1982).

tion of privacy (see *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981)), a search satisfies the "reasonableness" requirement of the Fourth Amendment despite absence of probable cause to believe that a violation will be found, even where a residence is involved. See *Donovan* v. *Dewey*, *supra*, 452 U.S. at 598-602; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538.

Given the extremely limited nature of the privacy intrusion involved in the search of a field, it is appropriate that such searches not be constrained by the strictest level of Fourth Amendment protection. There will be situations where the police receive information not amounting to probable cause that there is evidence of criminal activity in a field, such as a marijuana crop, but it would be difficult to investigate this suspicion further without entry onto the field.[19] In light of the minimal adverse consequences that would occur from an entry if the information turns out to be erroneous, it is "reasonable" within the meaning of the Fourth Amendment, even if a field is posted or surrounded by an exclusionary fence, to permit police to enter onto it on the basis of reasonable suspicion of criminal activity, rather than being forced to ignore the information they have received. See *United States* v. *Johnson*, 561 F.2d 832, 852-853 (D.C. Cir.) (MacKinnon, J., con-

[19] Even where an aircraft or helicopter could verify the suspected presence of a marijuana crop as accurately as an officer on foot, the incremental likelihood that the officer will see private matter not visible from the air is so slight that we find it hard to believe that the Fourth Amendment requires the great added expense of aerial surveillance to safeguard individual privacy interests.

curring), cert. denied, 432 U.S. 907 (1977); *United States* v. *Knight*, *supra*, 451 F.2d at 278.[20]

There can be little doubt that the police officers had a reasonable suspicion that criminal activity was afoot on petitioner's farm before they entered. They received an anonymous tip stating that petitioner had a large amount of marijuana growing on his farm and giving specific directions on how to find the marijuana, namely, by following the Sugar Camp Road (J.A. 2-3, 19). This tip was supplemented by other reports the officers had received from people in the community that there was questionable activity on

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[20] Several courts have suggested that certain police investigative techniques that are more in the nature of searches than seizures implicate the protections of the Fourth Amendment, yet may be conducted based on a level of suspicion less than probable cause. See *United States* v. *Allen*, *supra*, 675 F.2d at 1381 (helicopter surveillance); *United States* v. *Beale*, 674 F.2d 1327, 1334-1335 (9th Cir. 1982), petition for cert. pending, No. 82-674 (dog sniff); *United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981) (beeper installation and monitoring); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978) (beeper installation and monitoring); *United States* v. *Johnson*, 413 F.2d 1396, 1399-1400 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970) (inspection of automobile vehicle identification number). The Court has since held in *United States* v. *Knotts*, *supra*, that monitoring a beeper does not implicate any protected Fourth Amendment interest. By the same token, we do not necessarily agree that the other investigative techniques listed above implicate any constitutional protection. Nevertheless, we believe that the courts in these decisions have utilized a sound analytic framework in acknowledging that certain classes of searches, although subject to the Fourth Amendment, are reasonably justified when the police possess reasonable suspicison of criminal activity short of probable cause, but would be unreasonable if conducted on a random or suspicionless basis.

petitioner's farm (J.A. 3). This information raised a sufficient degree of suspicion that the officers would have been remiss in their duties had they not investigated further, and it surely justified the minimal privacy intrusion involved in walking along the path through petitioner's farm to the open field where the marijuana was growing.[21] Thus, even if the Court rejects our primary submission that the posting of his field and the presence of a gate across the road did not give petitioner a legitimate expectation of privacy in his field that implicates Fourth Amendment protections, the police entry onto the field did not violate the Fourth Amendment's proscription against "unreasonable searches and seizures" because it was based on a reasonable suspicion of criminal activity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MAY 1983

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[21] We emphasize again that, had the suspicions entertained by the police been unfounded, their activities would have produced a quiet afternoon stroll through the cornfields, but no likely exposure to any of petitioner's private effects.

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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

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RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

Petitioner respectfully replies to certain of the arguments made by the United States, and, in addition, requests this Court to consider the interests expressed by the United States Senate in passing the Immigration Reform and Control Act of 1983, including an amendment requiring that immigration agents obtain search warrants before entering open fields to search for illegal aliens. S. 529, 98th Cong. 1st Sess., 129 Cong. Rec. 6905 et seq., passed May 18, 1983.

I.

The United States suggests the Petitioner has failed to prove that he is entitled to the protection of the Fourth Amendment. The United States argues that "mere" posting and fencing does not give rise to a reasonable expectation of privacy in the farm land owned by the Petitioner. They argue, also, that because the Petitioner leased certain portions of his property—the fields wherein the marijuana was discovered—he cannot claim the protection of the Fourth

Amendment, even though the State Police trespassed a mile and a half into Petitioner's property, and past his home, before reaching these fields. The United States' argument mistakenly places the burden on the Petitioner to demonstrate that the Fourth Amendment protects him from the State Policemen's warrantless actions. It is firmly established that the opposite is true: the *government* bears the burden of establishing that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 455 (1971); [Br. for Pet., p. 12]. (Emphasis added).

The presumption, therefore, is that the Petitioner's farm is entitled to the Fourth Amendment protection provided by the warrant clause. The United States did not, however, explain or describe any exigent circumstances that prevented them from obtaining a warrant to search Petitioner's farm. Simply, they have failed to satisfy their burden, and the search was in violation of the Fourth Amendment.

The totality of the circumstances surrounding the warrantless search of the Petitioner's farm demonstrates that the Petitioner manifested, in many ways, his desire for privacy. The United States has chosen to examine each of these manifestations in isolation in an effort to convince this Court that the Petitioner could not reasonably have expected privacy. Specifically, the United States claims that "No Trespassing" signs do not create a legitimate expectation of privacy in the field, and that fences around the Petitioner's property did not "enhance" a reasonable expectation

of privacy.[1] However, these actions by the Petitioner, combined with the facts that (1) someone shouted at the State Police and requested they leave; (2) the State Police trespassed a mile and a half into Petitioner's secluded farm property and past his home; and (3) the marijuana fields could not be seen by anyone standing on public roads, the Cumberland River, or anywhere not on Petitioner's property, certainly lead to the conclusion that the Petitioner should be entitled to the warrant protection of the Fourth Amendment. The Petitioner's fields were not open fields.[2] This result is particularly required in this case, because the United States *admits* that (1) the State Police did not have probable cause to search the farm, and (2) there were no exigent circumstances which would excuse the lack of a search warrant. [Pet. App., p. 40, f.n. 4].

The United States argues that, because the Petitioner leased certain of his fields to third parties, the State Police were not required to obtain a search warrant before they entered the Petitioner's farm, drove past his home, and walked deep into Petitioner's property *before* discovering the secluded, leased, marijuana fields.[3] This argument is without merit and could deprive property owners around the country of the protections guaranteed by the Fourth Amendment. The argument that a farm owner waives his right to require that government agents obtain a search warrant before searching his entitre secluded farm property because he has leased portions of that farm has obvious constitutional and practical flaws.

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[1]See, Br. for U.S., pp. 17-19.

[2]See, Br. for Pet., pp. 20-24.

[3]See, Br. for U. S., pp. 23-24.

In *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), this Court determined that the defendant did not have a legitimate expectation of privacy in contraband found by police in another's purse because (1) the defendant had never sought or received access to the purse prior to the bailment, (2) the defendant did not have any right to exclude others from access to the purse, and (3) the defendant did not take normal precautions to maintain his privacy interest. 448 U. S. at 105. In *Rawlings* the Court relied on the holding in *Rakas* v. *Illinois*, 439 U. S. 128 (1978) that the question of standing to assert Fourth Amendment rights is merged into the determination of whether "*governmental officials* violated any legitimate expectation of privacy" held by the defendant. 448 U. S. at 106. (Emphasis added).

It is clear that, according to this standard, the Petitioner exhibited a legitimate expectation of privacy in his farm land, and in the farm land leased to others: the Petitioner, as owner of the farm land, leased the fields where the marijuana was discovered for a period of six months to certain, named, parties. As owner of the fields, and as owner of all of the land surrounding the fields, including the road leading past his home to the area of his farm where the fields were discovered, he retained the right to exclude the public from access to those fields. Finally, the Petitioner took extensive precautions to maintain his privacy interest —as the district court stated: "Short of posting guards at the entrance, it is difficult to see what else the [Petitioner] could have done to assert his privacy interest in his property." [Pet. App., p. 23].

Further, by asserting that, because the Petitioner leased portions of his land, he had no expectation of

privacy because the *lessees* or their *invitees* could enter the farm property, the United States has misinterpreted the standard set forth by this Court in regard to the "exclusion of others". Shortly after this Court's decision in *Katz* v. *United States,* 389 U. S. 347 (1967), Justice Harlan, whose concurring opinion in *Katz* is the lodestar of search and seizure analysis, wrote for the majority in *Mancusi* v. *DeForte,* 392 U. S. 364 (1968). Justice Harlan stated that the capacity to claim the protection of the Fourth Amendment depends "upon whether the area was one in which there was a reasonable expectation of freedom from *governmental intrusion*". 392 U. S. at 368. (Emphasis added). This is the crucial issue, the Justice stated, according to *Katz. Id.* The mere fact that the Petitioner leased a portion of his farm property does not, therefore, prevent him from claiming the protection of the Fourth Amendment, particularly because he had so clearly manifested his desire for protection from warrantless *public* and *governmental intrusion.*

The United States' argument that the lease in this case prevents the Petitioner from claiming Fourth Amendment protection is also contrary to this Court's decisions in *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861 (1974), and *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307 (1978). In these cases this Court determined that, without a warrant, a government agent is in no better position than a member of the public, and that a person's Fourth Amendment right has been violated if the warrantless government agent searches or seizes in an area from which the public was excluded. 436 U. S. at 315; 416 U. S. at 865. Since the essence of Fourth Amendment protec-

tion is freedom from warrantless governmental intrusion, and, without a warrant, a government agent stands in no better position than a member of the public, the fact that the Petitioner leased his fields to other, *named* parties does not indicate that members of the general public, or governmental agents, were free to trespass and conduct warrantless searches on Petitioner's farm.

That a lease or other similar agreement does not waive Fourth Amendment protection is made clear by the *Western Alfalfa* and *Marshall* decisions. The defendants in both of these cases were businesses, operating on commercial property. Employees, contractors, and persons leasing buildings or land on the commercial property probably came and went on a daily basis, certainly often without the express authorization or knowledge of the owners of the property. This fact did not prevent this Court from affording these areas Fourth Amendment protection, if the *public* was excluded. 416 U. S. at 865.

The public was similarly excluded from Petitioner's farm, and from the leased fields. Yet, the United States argues that the Petitioner had no expectation of privacy in these areas because he "had no expectation whatsoever that persons unknown to him would not enter these fields at the invitation of the lessees . . ." [Br. for U. S., p. 23]. *Western Alfalfa* and *Marshall* clearly reject this argument for constitutional reasons and for logical reasons as well; a lease to named parties cannot be construed to be the equivalent of an invitation to the entire world, and government agents, to ignore "No Trespassing" signs, a locked gate, verbal

warnings, and other manifestations of the owner's desire to exclude the public.

II.

The United States Senate on May 18, 1983, passed the Immigration Reform and Control Act of 1983, S. 529, by a vote of 76-18. S. 529, 98th Cong., 1st Sess., 129 Cong. Rec. 6969. Idaho Senator James A. McClure, with Senators Symms, Laxalt, Tower, Wilson, Cranston, DeConcini and Domenici proposed an amendment to the Bill, as follows:

> Section 287 of the Immigration and Nationality Act (8 U.S.C. 1357) is amended by adding at the end thereof the following:
>
> "(d) Notwithstanding any other provision of this section, other than paragraph (3) subsection (a), *an officer or employee of the Service may not enter onto the premises of a farm or other agricultural operation without a properly executed warrant.*" Amendment 1279. (Emphasis added).

The amendment passed by a vote of 62-33. The effect of the amendment, if passed by the House of Representatives and signed into law by the President, would be to prohibit warrantless searches of farm operations by INS agents.[4] The amendment was supported by a wide range of groups, whose concerns echo those of the Petitioner and amicus curiae in this case. Among the groups supporting the amendment were the American Farm Bureau, the National Cattlemen's Association, the National Wool Growers Asso-

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[4]The House version of the Bill, H.R. 1510, is currently pending in the House Rules Committee.

ciation, the United Fresh Fruit and Vegetable Growers, and the American Civil Liberties Union.

Sen. McClure explained that the INS currently relies on the open fields doctrine as authority for warrantless, random searches of agricultural operations, in their effort to apprehend illegal alien farm laborers. The Senator stated that:

> There is no question that the fourth amendment protects people, not places; that is exactly the idea that this amendment seeks to reinforce. The objective determination of probable cause by a magistrate—for which all people have guarantees—is not afforded—either to the farmer or the farm workers under the current practice.

129 Cong. Rec. at 6915. The Senator noted the incongruence between the Fourth Amendment protection afforded employees and persons in other businesses, and the lack of Fourth Amendment protection afforded farmers and ranchers in their business. The farm, the Senator stated, "is nothing less than a factory without walls—a business operation that is vital to our Nation's economy." *Id.* Indeed, the Petitioner's farm did have "walls"; the "No Trespassing" signs, the locked gate, the fences, the Cumberland River and thick natural foliage surrounding the property provided barriers to entry and notice to the public to not enter.

Senator Towers, speaking for the amendment, noted that passage of the amendment did not provide any special protection for farmers. It would merely "ensure that farmers, ranchers, and farm workers are afforded the ***same standard of protection against un-***

reasonable and warrantless searches as other businessmen and workers now enjoy." 129 Cong. Rec. at 6936. Senators Symms and Kennedy also spoke for passage. *Id.*, at 6934, 6935.

Passage of the amendment is strong evidence of the national interest in preserving farmers' and property owners' right to be free from unreasonable and warrantless searches by government agents. The Petitioner's case presents an even stronger argument for protection than did the circumstances that prompted the United States Senate to approve the warrant-requirement amendment to the Immigration Reform and Control Act. The Senate was presented with cases in which the INS agents searched open fields after having actually sighted persons they believed to be illegal aliens working in the fields. *Id.*, at 6915. The record in this case demonstrates that the secluded marijuana fields could not be, and were not, seen by the State Police from any point outside Petitioner's property. In fact, the State Police saw marijuana growing in the Petitioner's corn field only after having driven onto his property and past his home and a locked gate, and, in total, travelling a mile and a half into Petitioner's farm property. [Br. for Pet. pp. 4, 5]. The State Police should not be permitted to base such violations of the Fourth Amendment on an unrealistic application of the open fields doctrine, particularly in light of the analysis required by this Court in *Katz*. Under this analysis it is clear that the Petitioner exhibited an actual expectation of privacy, and that this expectation is one that society is prepared to recognize as reasonable. Passage by the United States Senate of Amendment 1279 to the Immigration Reform and

Control Act of 1983 is strong evidence that the Petitioner's expectation of privacy *is* one that society accepts as reasonable.

CONCLUSION

For the reasons hereinabove stated, the Petitioner respectfully requests this Honorable Court to reverse the decision of the Sixth Circuit Court of Appeals which reversed its earlier decision affirming the suppression by the District Court of the evidence obtained in violation of the Fourth Amendment to the United States Constitution.

Respectfully submitted,

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NO. 82-15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

RAY E. OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF AMICUS CURIAE, THE STATE OF CALIFORNIA, IN SUPPORT OF RESPONDENT THE UNITED STATES OF AMERICA

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BRIEF OF AMICUS CURIAE, THE STATE OF CALIFORNIA, IN SUPPORT OF RESPONDENT THE UNITED STATES OF AMERICA

INTEREST OF AMICUS CURIAE

The State of California has an important interest in the outcome of this case.

The State of California is faced with the daily task of enforcing its criminal laws against individuals who cultivate large amounts of marijuana and conduct other illegal drug operations in

open fields. The State is seriously concerned that limitation of the open fields doctrine may restrict the ability of its law enforcement officers to ferret out these areas under cultivation and enforce its drug laws. The State is also charged with protecting its valuable natural resources such as its land and wildlife. Restriction of the open fields doctrine may limit the ability of agencies charged with protecting the State's resources from doing their jobs.

In addition, limitation of the open fields doctrine could lead to confusion among state officials regarding what lands are subject to a warrantless search. This could only serve to aggravate a recent trend in California where a significant proportion of felony cases have had to be rejected for prosecution due to search and seizure problems. Indeed, this problem was particularly pronounced in drug cases.

Maintenance of the open fields doctrine is of particular import to California at this time as lower California courts have been confused on this issue of federal law. Moreover, with the recent enactment of the Victim's Bill of Rights in California, California courts may no longer use independent state grounds to invalidate a search. Thus, this Court's interpretation of the open fields doctrine will have a direct impact on California courts, law enforcement and all the citizens of California. (Cal. Const., art. I, § 28(d).)

SUMMARY OF ARGUMENT

A. Katz v. United States (1967) 389 U.S. 347, does not affect the open field doctrine first enunciated by this Court in Hester v. United States (1924) 265 U.S. 57. The Katz decision never purported to overrule or limit the open

fields doctrine, but instead cited it with approval. Similarly, Justice Harlan's concurring opinion in Katz cites Hester with approval.

Furthermore, the Fourth Amendment itself and decisions of this Court in various cases such as Air Pollution Variance Bd. v. Western Alfalfa (1974) 416 U.S. 862, show the Katz decision did not invalidate or modify the open fields doctrine first enunciated in Hester. Indeed, other federal and state courts have reached the same conclusion. Support for this position may also be found in the fact this Court and other courts have continued to consider the type of property involved in deciding whether a warrantless search is appropriate. Thus, Katz did not preclude consideration of the type of property involved in the search in determining whether a warrant is required.

Policy considerations such as the need to not unnecessarily limit state officers searching for contraband and public resource violations as well as the need for predicability in search and seizure law also weigh in favor of keeping the open fields doctrine in its present form.

B. Even assuming arguendo that the Katz decision applies to open fields, it does not overrule the open fields doctrine. Rather the open fields doctrine still has independent meaning as it indicates open fields are not areas in which one can reasonably expect to have a right to privacy.

C. Application of the Katz standard to open fields does not let the owner determine for himself whether he has an expectation of privacy as petitioner suggests. Rather, it must also be determined whether the expectation of privacy

is one that society is prepared to recognize as reasonable.

ARGUMENT

I

KATZ V. UNITED STATES DOES NOT AFFECT THE OPEN FIELDS DOCTRINE FIRST ENUNCIATED BY THIS COURT IN HESTER V. UNITED STATES

The fundamental issue presented in this case is what is the scope of the open fields doctrine first enunciated by this Court in Hester v. United States (1924) 265 U.S. 57. It is the position of amicus curiae, the State of California, that the Katz decision was not intended to affect the open fields doctrine. Consequently, that doctrine has the same vitality today that it had when first espoused in Hester back in 1924.

In Hester v. United States, supra, a revenue agent watched the home of Hester's father and, from a distance of 50

to 100 yards, saw Hester hand a bottle to a person who was believed to be a customer of bootleg whiskey. The agents were observed, Hester went to his car and removed the jug from it. He then ran through the fields. Both the bottle carried by the customer and the jug carried by Hester were thrown into an open field. The agents later examined the bottles.

In a unanimous opinion it was held there had been no illegal search although the officers had technically trespassed on the property. This Court also concluded the special protection given by the Fourth Amendment to persons, houses, papers and effects is not given to open fields. This Court also noted the distinction between open fields and a house is as old as the common law.

The Hester rule was applied over the years to nearly any lands which did

not fall within the curtilage. In Care v. United States (10th Cir. 1956) 231 F.2d 22, the rule was applied to a cave about 125 yards of a house. The cave was found to be in the open fields because it was not located in the curtilage. The open fields doctrine has also been applied to police entry into wooded areas, desert, vacant lots in urban areas, open beaches, reservoirs and open waters. (See LaFave, Search and Seizure, ch. 2, § 2.4, p. 332; Ringel, Searches and Seizures, § 8.4, p. 8-27.)

In Katz v. United States (1967) 389 U.S. 347, this Court first stated the concept that the Fourth Amendment protects people and not places. In addition, there was discussion of the fact the Fourth Amendment issues dealt primarily with the question of a reasonable expectation of privacy. From this language, courts have reached conflicting

conclusions as to the continuing viability of the open fields doctrine.

Some courts have taken the position that Katz sounded the death knell of the open fields doctrine and had actually overruled Hester. Other courts took the position that the open fields doctrine had not been affected at all by Katz. A third theory was that a per se theory of an open field exception to the Fourth Amendment had been undermined by Katz. However, the open fields doctrine is still a useful tool for deciding that, under Katz, one cannot have a reasonable expectation of privacy in open fields. (State v. Cemper (Neb. 1981) 307 N.W.2d 820, 822; Goehring v. State (Tex. 1982) 627 S.W.2d 159.)

As noted earlier, it is the position of the State of California that Katz did not have any impact on the scope

and viability of the open fields doctrine first enunciated in Hester.

In Katz v. United States, supra, 389 U.S. 347, this Court concluded eavesdropping by the government agents on the defendant's phone conversation in a phone booth violated the defendant's rights under the Fourth Amendment. In reaching this conclusion Justice Stewart stated the now famous and oft quoted phrase that, ". . . the Fourth Amendment protects people, not places" and also indicated the question to be considered was the person's expectation of privacy. (Id., at pp. 351, 353.)

A careful glance at the Katz decision indicates it really did not have any impact on the rule relating to open fields. First, the Katz decision had nothing to do with open fields. Instead, it dealt with an enclosed phone booth. Moreover, much of the decision seemed to focus on the inherent problems and dangers

involved in government wiretapping and/or eavesdropping. This area has always been of special concern to this Court, Congress and the states, and has been given special treatment over the years. (See, e.g., Cal. Pen. Code, § 630 et seq. relating to wiretapping and eavesdropping; see too Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520.)

Moreover, a footnote in the majority opinion indicates that the parties agreed an open field is not one of the areas protected by the Fourth Amendment and then cites Hester v. United States. (Katz v. United States, supra, 389 U.S. at p. 351, fn. 8.) This hardly indicates Katz was designed to limit the application of Hester.

Similarly, Justice Harlan in his concurring opinion indicated Katz had nothing to do with open fields and repeated the fundamental distinction between areas

protected by the Fourth Amendment and open fields.

> "I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383, and unlike a field, Hester v. United States, 265 U.S. 57, a person has a constitutionally protected reasonable expectation of privacy; . . ." (Katz v. United States, supra, 389 U.S. at p. 360 (conc. opn. of Harlan, J.).)

In addition, later in his opinion he observed that conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable citing Hester v. United States. (Katz v. United States, supra, at p. 361.)

Thus it is far from clear, as petitioner would suggest (see AOB 19), that Katz overruled or limited the open

fields doctrine. Indeed, it appears that Katz reaffirmed the proposition that open fields differ from other areas and are not subject to Fourth Amendment protection.[1/]

Moreover, the language of the Fourth Amendment itself points to the conclusion Katz was not designed to limit the open fields doctrine. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ." While the amendment specifically protects persons, houses and possessions of persons, it does not specifically state there is any protection for open fields.

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1. The Wisconsin Supreme Court has even suggested Katz was designed to limit the right of privacy of individuals in areas already protected by the Fourth Amendment such as the house and curtilage area. (Conrad v. State (Wisc. 1974) 218 N.W.2d 252, 258.)

Furthermore, one cannot help but notice that for a doctrine petitioner would contend was overruled by Katz, the open fields doctrine and the Hester decision have been repeatedly cited and relied on by this Court.

In Bivins v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 393, this Court cited Hester and the open fields doctrine as an example of where there was no violation of Fourth Amendment rights although local law may have been violated. (Id., at p. 393, fn. 6.)

The open fields doctrine and Hester were again cited in Cady v. Dombrowski (1973) 413 U.S. 433, 449-450, where this Court observed it did not have to consider whether the search of the back seat of a car located in an open field required a warrant in light of Hester v. United States.

Moreover, the open fields doctrine was heavily emphasized by this Court in Air Pollution Variance Bd. v. Western Alfalfa, supra, 416 U.S. 862. There a state health inspector entered the yard of the alfalfa company without its knowledge and consent and without a warrant to make an air pollution test on the smoke being emitted from the company's plant. This Court found no violation of any Fourth Amendment rights was involved in the conduct of the inspector. Indeed, relying heavily on Hester, it was noted the Fourth Amendment did not apply to open fields such as involved there where the inspector did not enter the buildings of the company, but observed what anyone near the plant could see in the sky. Indeed, without citing the Katz decision at all this Court observed that the inspector was ". . . well within the 'open fields' exception to the Fourth

Amendment approved in Hester." (Air Pollution Variance Bd. v. Western Alfalfa, supra, 416 U.S. at p. 865, emphasis added.)

Hester and the open fields concept have also been cited with approval in decisions of this Court in United States v. Santana (1976) 427 U.S. 38, 42 and G. M. Leasing Corp. v. United States (1977) 429 U.S. 338, 351, as well as Rakas v. Illinois (1978) 439 U.S. 128, 143-144, fn. 12. The open fields doctrine thus has had a rather lively history for a "dead" doctrine.

Indeed, the Hester decision was cited just this term in United States v. Knotts (Mar. 2, 1983) ___ U.S. ___ (51 U.S.L.Week 4232; but see conc. opn. of Blackmun, J.). In Knotts a beeper was placed in a five gallon drum containing chloroform purchased by one of the codefendants. By monitoring the progress of a car carrying the chloroform, agents were able to trace the can from its place

of purchase to its destination. This Court concluded use of the beeper did not constitute a search or a seizure and validated use of the beeper.

In reaching this conclusion this Court relied on the Katz doctrine of expectation of privacy. However, this Court also impliedly noted that there was no Fourth Amendment protection for open fields.

> "But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open field.' Hester v. United States, 265 U.S. 57 (1924)." (United States v. Knotts, supra, 51 U.S.L.Week at p. 4234.)

Consequently, a reading of the prior decisions of this Court leads to the unmistakable conclusion that the Katz doctrine has not had any impact on

the viability of the open fields doctrine. Rather that doctrine is as viable and strong as when it was first enunciated in Hester.

While it is true that cases can be cited for the proposition that Katz has limited Hester (see, e.g., State v. White (Ariz. 1977) 574 P.2d 840, 847 and cases cited therein), a substantial number of federal and state cases do support the proposition that the Hester decision and the open fields doctrine have not been limited by the Katz decision. (State v. Dow (Me. 1978) 392 A.2d 532; State v. Osborn (Ohio 1980) 409 N.E.2d 1077; Casey v. State (Nev. 1971) 488 P.2d 546; State v. Charvat (Mont. 1978) 573 P.2d 660, 661; Commonwealth v. Janek (Pa. Super. 1976) 363 A.2d 1299; United States v. Cobler (W.D. Va. 1982) 533 F.Supp. 407, 411; United States v. Ramapuram (4th Cir.

1980) 632 F.2d 1149, 1155; United States ex rel. Saiken v. Bensinger (7th Cir. 1976) 546 F.2d 1292; United States v. Basile (9th Cir. 1978) 569 F.2d 1053, 1056.)

Moreover, while some lower California courts have concluded the California Supreme Court has embraced the Katz rule and thereby diluted the open fields doctrine (see, e.g., Soli v. Superior Court (1980) 103 Cal.App.3d 72, 79-81), it appears that in its most recent pronouncement on the subject the California Supreme Court has treated open fields as a separate area in which there is no Fourth Amendment protection.

In People v. Dumas (1973) 9 Cal.3d 871, 882, the court was discussing certain places which may be searched without a warrant even when there is no emergency present. In a footnote to this discussion it was observed that:

> "This category includes places that may be classified as 'open fields' (Hester v. United States (1924) 265 U.S. 57, 58-59), and places in which a defendant has not exhibited a subjective expectation of privacy or where such an expectation would be unreasonable (People v. Bradley (1969) 1 Cal.3d 80, 85). [Citation.]" (People v. Dumas, supra, 9 Cal.3d at pp. 882-883, fn. 10, emphasis added.)

It is of particular interest to note the court treats open fields separately from areas in which an individual might have an expectation of privacy. This separation of open fields from the general rules on expectation of privacy certainly suggests the California Supreme Court concluded the open field doctrine stands apart from Katz and still stands for the clear proposition that the Fourth Amendment simply does not apply to open fields.

Thus, federal courts and state courts have also reached the conclusion

that Katz has not limited the scope and viability of the open fields doctrine.

It must also be observed that those commentators and courts who have been unable to reconcile Katz and Hester have placed great emphasis on the language in Katz that the Fourth Amendment protects persons and not places. However, this language in Katz did not end consideration of the fact that different places receive different levels of Fourth Amendment protection. Consequently, there is no reason why the Katz decision precludes a finding that open fields are exempted from Fourth Amendment protection.

Indeed, as observed earlier, Justice Harlan noted that the place of the search was still paramount in order to determine what protection is afforded to persons. (Katz v. United States, supra, 389 U.S. at p. 361 (conc. opn. of Harlan, J.); see too Rakas v. Illinois, supra, 439 U.S. at pp. 143-144, fn. 12.)

In accord with this concept, special recognition has been given to searches at the border. (See United States v. Ramsey (1977) 431 U.S. 606, 619-622.) Similarly, vehicles have been given a different level of protection than homes or offices. (South Dakota v. Opperman (1976) 428 U.S. 364.) Likewise, it has been noted there is no right to privacy in jails. (Lanza v. New York (1962) 370 U.S. 139.) See People v. Dumas, supra, 9 Cal.3d at pages 881-885 for an extensive discussion on this topic. "The pattern of prior decisions suggests that one of the most crucial determinants of the validity of warrantless searches is the nature of the place subjected to search." (Id., at p. 881.)

Accordingly, the Katz decision does not require that the open fields doctrine be abandoned. Instead, Katz and Hester can be reconciled by concluding

Katz discusses expectation of privacy in areas protected by the Fourth Amendment while this Court has concluded there is no Fourth Amendment protection at all where open fields are involved.

Several policy considerations also point to the need for maintaining the open fields doctrine in its present form.

First, one of the major concerns in California as in other states involves detection of large fields of marijuana. In order to detect these marijuana fields which are often in remote areas, airplane overflights have been employed. If the open fields doctrine were applied in its present form, there would certainly be no problem with flying over these open fields to look for marijuana. However, if Katz were applied, questions as to whether there is an expectation of privacy in certain airspace could become troublesome.

In California, for example, some of the lower courts have applied Katz to open fields searches despite the language in People v. Dumas quoted earlier. Consequently, some confusing results have obtained.

In People v. Sneed (1973) 32 Cal.App.3d 535, the court found a landowner had a right to privacy with regard to flights over his open fields when the flights were too close to the ground. However, in a later case it was held a landowner under similar circumstances had no right to privacy with regard to overflights at an altitude of 300 feet or more. (Dean v. Superior Court (1973) 35 Cal.App.3d 112.)

Thus, depending on the facts, it is arguable there is no right to privacy in an open field after Katz in California, a right to privacy in the airspace over that field up to 300 feet and no right to

privacy above that altitude. Such a result makes no sense and only serves to artificially limit law enforcement investigation.

It is of interest to note the dissent below indicates while Mr. Oliver had an expectation of privacy with regard to persons entering his property here, he had no expectation of privacy with regard to overflights. (United States v. Oliver (6th Cir. 1982) 686 F.2d 356, 372.) The varying views of these cases as to the right to privacy with regard to persons actually on the land and overflights also points up the confusion that can be generated if Katz is applied to open fields. By contrast, if Hester applied here, the fields 1.4 miles from the house and subject to overflights would clearly be open fields. (Id., at p. 362.)

Moreover, if Katz were applied to a place which heretofor has not received any Fourth Amendment protection,

it could result in application of Katz to other places which have generally not been subject to an ad hoc balancing test as to the privacy interest in each case. These areas include borders and moving vehicles.

It must also be noted that California, like many other states, has vast plant and animal resources which it must protect. These natural resources are protected in part by the ability of state Fish and Game and Forestry officers to enter private lands for inspection purposes without a warrant. (See, e.g., Cal. Fish & Game Code, §§ 1006, 7702; Cal. Pub. Resources Code, § 4119.) While these entries may be justified in part as administrative searches, the right to conduct these searches without a warrant rests in part on the fact open fields and areas are being inspected. Thus, restriction of the open fields doctrine

may seriously hamper the ability of these officers to inspect open lands for resource violations without a warrant. Moreover, the warrant requirement would make such inspections almost impossible as many of the areas to be inspected are in remote and/or rugged regions. By the time a warrant would be obtained hours or days later the cost in time and man hours could be prohibitive and the resources in question could be severely damaged or destroyed in the interim. (See, e.g., State v. Dow, supra, 392 A.2d 532.)

Furthermore, this Court has recently expressed a concern over the need to give law enforcement officers some ability to predict what searches will be upheld instead of having to make a guess on a case by case basis. (See, e.g., New York v. Belton (1981) 453 U.S. 454, 457-460; United States v. Ross (1982) ___ U.S. ___ (72 L.Ed.2d 572).) This same concern should apply to open fields.

While officers under Hester have to determine in each case whether a field is truly an open field, with some predicability they can determine whether the area searched is near a house or protected area or is an open field. This is certainly easier than having to predict whether a court at some later point will conclude under Katz that the owner did or did not have a subjective expectation of privacy which society objectively is willing to determine is reasonable as required by Katz.

Applying Katz to open fields also could open a whole myriad of problems with regard to whether an officer may look under a bush in a given field, dig a small hole, look under a rock or in the tall grass. It is possible that different expectations of privacy conceivably could attach to these different areas.

Thus, it seems more practical and realistic to apply the open fields doctrine espoused in Hester to open lands. This is particularly true when it is considered that an evaluation as to whether the field is truly an open field will in most cases protect the same interests of society and the individual that Katz would protect, but with much less confusion.

Thus, leaving Katz out of the open fields analysis will continue to allow officers to make objective determinations with some predicability as to whether a search is or is not proper. However, application of Katz to this area will only create the confusion this Court sought to avoid in the Belton and Ross decisions. Thus, sound social and policy interests also weigh against application of Katz to open fields.

Application of the "open fields doctrine" to this case clearly mandates the

finding the warrantless search here was proper under the open fields doctrine since, as the Sixth Circuit concluded, the land was clearly beyond the curtilage area. (United States v. Oliver, supra, 686 F.2d at p. 360.)

II

EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT UNITED STATES V. KATZ APPLIES TO OPEN FIELDS, IT DOES NOT OVERRULE THE OPEN FIELDS DOCTRINE

There is a suggestion in petitioner's brief that not only does the Katz decision apply to open fields, but it actually overrules the entire open fields doctrine.

However, there is little if any support for this position. Rather, if it is assumed for the sake of argument that the Katz decision does apply to open field cases, it is clear the open fields doctrine still has not been overruled.

First, as noted previously, numerous cases of this Court have continued to cite the Hester decision in cases where Katz was also cited and in cases where Katz did not apply at all. (See Air Pollution Variance Bd. v. Western Alfalfa Corp., supra, 416 U.S. 861; Rakas v. Illinois, supra, 439 U.S. at p. 144, fn. 12; G.M. Leasing Corp. v. United States, supra, 429 U.S. at p. 352; United States v. Santana, supra, 427 U.S. at p. 42; Cady v. Dombrowski, supra, 413 U.S. at p. 450; Bivens v. Six Unknown Fed. Narcotics Agents, supra, 403 U.S. at p. 393, n. 6.)

Second, this Court in Katz as well as later cases has continued to recognize the nature of the property involved has a definite impact on the expectation of privacy. (See Rakas v. Illinois, supra; South Dakota v. Opperman, supra, 428 U.S. 364; United States v. Santana, supra.)

Indeed, in United States v. Knotts, supra, 51 U.S.L.Week 4232, this Court applied the Hester case and the open fields doctrine in determining under the Katz rationale whether there was a subjective expectation of privacy which was objectively reasonable.

Accordingly, since the property interest involved has a bearing on the balancing process required under Katz, there is ample reason and authority for using the Hester doctrine to determine whether the property interest in which a right to privacy is claimed is or is not an open field.

> "Ownership and possessory rights in 'places' are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place." (State v. Cemper, supra, 307 N.W.2d at p. 823.)

As was noted in Soli v. Superior Court, supra, 103 Cal.App.3d

at page 79: "'It now appears that Hester no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy.'" (Quoting from United States v. Freie (9th Cir. 1976) 545 F.2d 1217, 1223; United States v. Ramspuram, supra, 632 F.2d at p. 1155.)

A good example of this form of analysis can be found in United States v. Basile, supra, 569 F.2d 1053. There the court applied Katz to open fields. However, the court cited the Hester decision and concluded there was no expectation of privacy in a truck parked 100 yards from the house in question. This is a classic example of the logic employed by some courts in the open fields cases. (See United States v. Baldwin (5th Cir. 1982) 691 F.2d 718, 721-723; United States v. Williams (5th Cir. 1978) 581 F.2d 451.)

Accordingly, there is no merit to the suggestion in petitioner's brief that Hester has been totally overruled by Katz. Instead, it is apparent that at the very least Hester and the open fields doctrine provide a handy way of determining whether society wishes to respect the subjective expectation of privacy in the property owner. Moreover, this Court's holding in Hester, in light of Katz, is essentially that society does not recognize as reasonable an expectation of privacy in open fields. Nothing in the Katz decision compels a contrary conclusion.[2/] (See United States v. Williams, supra, 581 F.2d 451; United States v. Baldwin, supra, 691 F.2d 718.)

---

2. Petitioner makes much of the fact the field in question here was fenced. However, numerous decisions have concluded the open fields doctrine is not restricted to fields that are unfenced and unposted. (See, e.g., United States ex rel. Saiken v. Bensinger, supra, 546 F.2d 1292; State v. Cemper, supra, 307 N.W.2d at p. 823; Casey v. State, supra, 488 P.2d 546.)

Accordingly, as the marijuana found here was in a true open field (United States v. Oliver, supra, 686 F.2d at p. 360), and was situated in such a way that petitioner had no right to privacy in the airspace over the marijuana according to the dissent below (id., at p. 372); petitioner clearly had no right to privacy in the marijuana under the Hester-Katz analysis of the warrantless search conducted here. Thus, even if Katz and Hester are applied together to this case, the warrantless search still was proper here.

---

2. (Continued)

Similarly, despite various statements to the contrary in petitioner's brief, the fact officers may have trespassed on the property does not invalidate the search under an open fields and/or Katz analysis. (Hester v. United States, supra, 265 U.S. 57; United States v. Jackson (4th Cir. 1978) 585 F.2d 653, 659; Air Pollution Variance Bd. v. Western Alfalfa, supra, 416 U.S. 861; People v. Krivda (1971) 5 Cal.3d 357; Katz v. United States, supra, 389 U.S. 347.)

III

APPLICATION OF THE KATZ STANDARD TO OPEN FIELDS DOES NOT LET THE OWNER DETERMINE FOR HIMSELF WHETHER HE HAS AN EXPECTATION OF PRIVACY IN THE FIELDS

Much of petitioner's brief seems to rest on the implied assumption that if Katz applies to fields such as the one in question here, the owner can determine for himself whether there is an expectation of privacy in the area to be searched. This is simply not true.

In United States v. Knotts, supra, 51 U.S.L.Week 4232, this Court noted the Katz test embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. This involves a question of whether the individual has shown that he seeks to preserve something as private. The second question is whether the

individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

Thus, a court must not only consider the intent and conduct of the owner of property, but the objective standards for the community in determining whether a right to privacy exists. Accordingly, the mere fact petitioner or a marijuana grower or drug importer posts a fence or a sign or may feel the area is secluded does not in and of itself given him an expectation of privacy. Society must also recognize his right to privacy. (See, e.g., State v. Cemper, supra, 307 N.W.2d at p. 823; Dean v. Superior Court, supra, 35 Cal.App.3d at p. 118, fn. 1.)

Consequently, we would respectfully suggest petitioner should not be permitted to dilute the objective standard of reasonableness imposed by Katz.

Furthermore, application of Katz and Hester here, as noted earlier, still indicate the warrantless search conducted here was proper.

CONCLUSION

Accordingly, amicus curiae, the State of California, respectfully requests this Court affirm the order of the United States Court of Appeals for the Sixth Circuit which had reversed the district court's order that the evidence seized in this case had to be suppressed.

Respectfully submitted,

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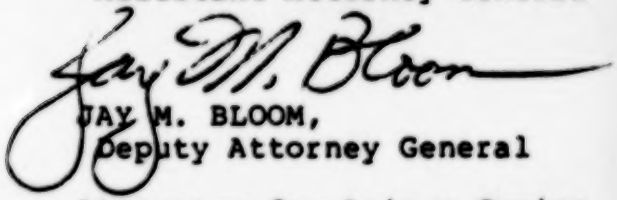

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NO. 82-15

RAY E. OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within BRIEF OF AMICUS CURIAE, THE STATE OF CALIFORNIA, IN SUPPORT OF RESPONDENT THE UNITED STATES OF AMERICA: An original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Rex E. Lee
Solicitor General of
the United States
Department of Justice
Washington, D.C. 20530

Frank E. Haddad, Jr.
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Each envelope was then sealed and, with the postage prepaid, deposited in the United States Mail at San Diego, California, on the 31 day of March, 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California March 31, 1983.

Clifford E. Reed

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 31ST day of MARCH,
1983.

Notary Public in and for Said County
and State

KAREN K. [illegible]
NOTARY PUBLIC -- CALIFORNIA
COUNTY OF SAN DIEGO
My Commission Expires [illegible]

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No. 82-15

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

RAY E. OLIVER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

California Farm Bureau Federation and Florida Farm Bureau Federation respectfully submit this brief in support of Petitioner's position.[1]

---

[1]It should be noted that California Farm Bureau Federation and Florida Farm Bureau Federation submitted a brief *amici curiae*, along with a motion for leave to file that brief, in a case involving similar issues now pending before this Court. That case is *State of Florida v. Brady, et al.* (docket number 81-1636).

INTEREST OF AMICI CURIAE CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION

California Farm Bureau Federation is a voluntary, non-governmental, non-profit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county Farm Bureaus with a combined membership at the close of its 1982 membership year of over 99,000 families. Over 85% of all commercial farmers in the State of California are members of county Farm Bureaus.

Florida Farm Bureau Federation is a voluntary, non-governmental, non-profit Florida corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of Florida. Its members consist of 64 county Farm Bureaus with a combined membership of over 95,000 families. Over 90% of all commercial farmers in the State of Florida are members of county Farm Bureaus.

California Farm Bureau Federation and Florida Farm Bureau Federation submit this brief *amici curiae* expressing their views in this case because this Court's disposition herein of the question regarding the scope of the "open fields" doctrine will affect the privacy rights and day-to-day operations of a substantial portion of the membership of their member county Farm Bureaus.

The factual circumstances of the case at bar involve the efforts of the United States to prosecute a suspected manufacturer of contraband. However, the Court's disposition of this case will impact not only the parties to this case or parties to future cases involving similar facts.

Rather, this Court's determination as to the scope and applicability of the "open fields" doctrine will affect the privacy rights of all law-abiding farmers and ranchers throughout the nation and their right to conduct their businesses without unwarranted governmental intrusion or interruption. Specifically, the outcome of this case will bear on the practice of entering agricultural fields at will currently exercised by law enforcement authorities, such as the United States Border Patrol.

California Farm Bureau Federation and Florida Farm Bureau Federation submit this brief to apprise the Court of the background of the U.S. Border Patrol practice of entering agricultural fields at will and the impact which the Court's opinion in the case at bar will have on that practice. Thus, the Court will be better enabled to render a comprehensive interpretation of the scope of the "open fields" doctrine and clear guidelines as to what does and does not constitute an "open field."

SUMMARY OF THE BRIEF AMICI CURIAE

This brief *amici curiae* discusses an on-going problem faced by hundreds and perhaps thousands of agricultural employers in this country.

For years, law enforcement agencies have relied on the "open fields" doctrine to enter agricultural fields at will. Of particular concern to agricultural employers is the reliance of the U.S. Border Patrol on that doctrine as authority to enter agricultural fields at will in search of undocumented aliens. Agricultural employers who are not also farm labor contractors as defined by statute (Farm Labor Contractor Registration Act of 1963, *as amended*, 7 U.S.C.

§ 2045(f)[2]) are not subject to prosecution under federal law for merely employing undocumented aliens (Immigration and Nationality Act, *as amended*, 8 U.S.C. § 1324(a)); nevertheless, the privacy and property rights of these employers are infringed routinely by immigration officers who regard agricultural fields as though the fields were open to the public.

This brief argues that the "open fields" doctrine does not authorize law enforcement officers to enter farms or other agricultural operations without valid consent or a particularized warrant. In the alternative, this brief argues that the "open fields" doctrine, as modified by this Court's opinion in *Katz v. United States*, 389 U.S. 347 (1967) and as interpreted by this Court in *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861 (1973), does not authorize law enforcement officers to enter the fields of a farmer or rancher who has taken reasonable steps to exclude the public therefrom, unless the officers first obtain valid consent or a particularized warrant, or have probable cause to believe that undocumented aliens are present in the fields, coupled with exigent circumstances justifying an immediate entry.

While *amici curiae* are convinced that *Katz* and *Western Alfalfa* compel the adoption of the latter argument, they

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[2]The Farm Labor Contractor Registration Act, *as amended*, 7 U.S.C. § 2041 *et seq.* remains in effect until April 14, 1983. On April 14, 1983, the Migrant and Seasonal Agricultural Worker Protection Act. Pub. L. No. 97-470 (1982) becomes effective, repealing the Farm Labor Contractor Registration Act of 1963, *as amended*. However, § 106(a) of the Migrant and Seasonal Agricultural Worker Protection Act will continue to prohibit farm labor contractors from hiring undocumented aliens.

are equally convinced that adoption of the former argument is compelled by concerns for privacy, property and due process rights of their members.

ARGUMENT

I

FARMS SHOULD ONLY BE ENTERED BY LAW ENFORCEMENT OFFICIALS WHO HOLD PROPERLY EXECUTED WARRANTS NAMING THE INDIVIDUALS BEING SOUGHT

In *Hester v. United States*, 265 U.S. 57 (1924) this Court first enunciated the so-called "open fields" doctrine. *Hester* held that the protections accorded by the Fourth Amendment to the United States Constitution do not extend to "open fields."

The "open fields" doctrine and other common-law property concepts are currently the basis for law enforcement officials to assert they have a carte blanche to enter agricultural fields at will. For example, the current policy of the immigration authorities which regards agricultural fields and other areas beyond the curtilage of a dwelling as unprotected by the Fourth Amendment is as follows:

> **The lawfulness of the search or seizure depends on whether or not it is reasonable under the Fourth Amendment to the Constitution, i.e. whether or not a warrant is required, and, if so, whether the warrant is valid and a proper search is made pursuant to the warrant.**
>
> . . . .
>
> **. . . There is, however, considerable case law holding that the Fourth Amendment does not apply to entry**

> onto so-called "open fields" . . . . The term "open fields" has been construed as applicable to private lands, not including dwellings, which are beyond the curtilage (an area of domestic use immediately surrounding a dwelling and usually, but not always, fenced in with the dwelling).

U.S. DEP'T OF JUSTICE, PUB. NO. M-69, THE LAW OF SEARCH AND SEIZURE FOR IMMIGRATION OFFICERS 24 (rev. Dec. 20, 1979).

The immigration authorities argue that because agricultural lands are beyond the curtilage of a dwelling, they are "open fields" and beyond the scope of protection of the Fourth Amendment. Therefore, Border Patrol agents need to obtain neither consent nor warrant in order to enter agricultural lands; nor do they need to have probable cause that some criminal activity is occurring thereon coupled with exigent circumstances prior to making such entry.

Along with state Farm Bureau organizations in 46 other states and Puerto Rico, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation are members of the American Farm Bureau Federation (AFBF). The AFBF is a voluntary non-governmental, non-profit Illinois corporation. Its purpose is to promote, protect and represent the business, economic, social and educational interests of farmers and ranchers throughout the United States. The AFBF represents more than 3 million member families.

At the 64th Annual Meeting of the American Farm Bureau Federation held in Dallas, Texas, in January 1983, the elected voting delegates of member state Farm Bureaus adopted the following policy, which is binding upon and

is the policy of each state Farm Bureau, including *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation:

> Laws governing the apprehension of illegal aliens should be carried out uniformly and equally in all industries. Entry to farms and agricultural operations should be permitted only when immigration officials hold properly executed warrants which name individuals that are being sought.

The policy quoted above demonstrates the strength of concern which growers have regarding searches by officers upon agricultural lands. Growers feel that indiscriminate entries and searches—especially on a routine basis—violate their property, privacy and due process rights. To alleviate this injustice, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation urge this Court as a part of its opinion in this case to disapprove expressly the notion that its opinion in *Hester v. United States, supra,* authorizes at will entries by officers onto farms and agricultural operations.

II

THE "OPEN FIELDS" EXCEPTION TO THE FOURTH AMENDMENT SHOULD NOT APPLY TO FIELDS CLOSED TO THE PUBLIC

At the time it was rendered and for some 43 years thereafter, the holding of *Hester v. United States, supra,* that the protections accorded by the Fourth Amendment to the United States Constitution do not extend to "open fields," was consonant with the then-existing principle that common-law property concepts control Fourth Amendment

analysis. However, with this Court's opinion in *Katz v. United States*, 389 U.S. 347, 351, 361 (1967) that "the Fourth Amendment protects people, not places" and protects an individual from unreasonable governmental intrusion when he exhibits an actual and reasonable expectation of privacy, common-law property concepts no longer ultimately determine whether or not Fourth Amendment protections apply to particular types of governmental intrusions.

Despite the effect of *Katz* on Fourth Amendment analysis, law enforcement officials such as the United States Border Patrol have continued to rely on the "open fields" doctrine and other common-law property concepts as a carte blanche for entering agricultural fields at will. While this simplistic approach to Fourth Amendment issues may make it easy for officers to decide whether or not Constitutional protections extend to a particular area, the approach is contrary to proper Fourth Amendment analysis since *Katz*.

Katz and its progeny shifted the focus of judicial inquiry regarding Fourth Amendment issues from one relying solely on common-law property concepts to one relying on the "reasonable expectation of privacy" doctrine. While it is true that Fourth Amendment analysis continues to rely to a great extent on the nature of the property where a search occurred, the nature of the property in question is now a guiding, rather than controlling, factor. *Katz*, in other words, modified previous Fourth Amendment analysis by requiring courts to examine the characteristics of the property where a search occurred in conjunction with the "reasonable expectation of privacy" doctrine.

Indeed, "reasonable expectation of privacy" must now be regarded as the controlling factor in Fourth Amendment analysis. For example, in *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861 (1973), this Court recognized the continuing existence of the "open fields" exception to the Fourth Amendment; nevertheless, in applying the "open fields" exception, the *Western Alfalfa* court recognized that the exception must be applied in light of *Katz*.

In *Western Alfalfa*, a state health inspector had entered defendant-corporation's outdoor premises in the daylight, without its knowledge or consent and without a warrant, to make an opacity test of smoke being emitted from the plant chimney. This Court at 416 U.S. 864-65 stated:

> The field inspector did not enter the plant or offices. . . . He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester v. United States* [citation] . . . refused to extend the Fourth Amendment to sights seen in the "open fields." The field inspector was on respondent's property *but we are not advised that he was on premises from which the public was excluded.* Under the Noise Control Act of 1972 [citation] an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. The *invasion of privacy* in either that case or the present one, if it can be said to exist, is abstract and theoretical. . . . Depending upon the layout of the plant, the inspector may operate within or without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in *Hester*. (Emphasis added.)

While the last sentence of the above quotation indicates that the "open fields" doctrine continues to exist as an exception to the Fourth Amendment, the phrases "invasion of privacy" and "we are not advised that he was on premises from which the public was excluded" indicate that the "open fields" doctrine has been modified by the "reasonable expectation of privacy" doctrine of *Katz*. Thus, under *Katz* and *Western Alfalfa*, it is the degree of public exclusion exercised by the party asserting his Fourth Amendment rights which is the critical factor in determining the "openness" of a field.

In fact, public exclusion from property is the feature which harmonizes the "reasonable expectation of privacy" and "open fields" rules. For example, where fields are closed to public entry, the "open fields" doctrine should not apply; by closing his fields, the individual expects them to remain private and free from unwarranted intrusion. On the other hand, where an individual does nothing to close his lands from public intrusion, he cannot later claim that he had exhibited a subjective expectation of privacy therein; in that situation, the application of the "open fields" doctrine would be proper.

Lower courts have recognized the effect of *Katz* on *Hester*:

> In *Katz v. United States* [citation] the court held that the Fourth Amendment protects people, not "places." Ever since that decision, the determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable. See [citation]. Thus, the focus is no longer on common law property concepts. See *Wattenburg v. United States*,

> 388 F.2d 853, 857 (9 Cir. 1968). It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy. *United States v. Magana*, 512 F.2d 1169, 1170 (9 Cir. 1975); *Patler v. Slayton*, 503 F.2d 472, 478 (4 Cir. 1974).

United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). *See also United States v. Basile*, 569 F.2d 1053, 1056 (9th Cir. 1978), *cert. denied*, 436 U.S. 920 (1978).

Further recognition of the effect of *Katz* on *Hester* is demonstrated by the following excerpt:

> Under *Hester v. United States* [citation] Perez had no Fourth Amendment protection in his backyard. However, that holding is clearly modified by the reasonable expectation of privacy doctrine of *Katz v. United States* [citation].

United States v. Perez, 440 F.Supp. 272, 287, n.43 (N.D. Ohio 1977), *aff'd*, 571 F.2d 584 (6th Cir. 1978), *cert. denied*, 435 U.S. 998 (1978).

Amici curiae California Farm Bureau Federation and Florida Farm Bureau Federation argue that the result of these decisions is a severe reduction of the importance of common-law property concepts in Fourth Amendment analysis. The concept of curtilage, for example, no longer has any independent meaning but merely describes an area in which one traditionally might expect privacy. Thus, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation assert that even in a field, one may have a reasonable expectation of privacy deserving the protections of the Fourth Amendment.

III

GROWERS WHO EXCLUDE THE PUBLIC FROM THEIR FIELDS REASONABLY EXPECT PRIVACY IN THEIR "FACTORIES WITHOUT WALLS"

The notion that growers are entitled to the protections of the Fourth Amendment in fields devoted to commercial purposes is strongly supported by case law regarding the applicability of those protections to other business operations. It is well-settled that the Fourth Amendment protects business operators against unreasonable searches and seizures. Unless they first have valid consent given by one lawfully entitled to give such consent or probable cause that criminal activity is occurring coupled with exigent circumstances, law enforcement officers may not enter commercial premises from which the public is excluded unless they have obtained a valid warrant.

The Fourth Amendment protects not only private homes (*Weeks v. United States*, 232 U.S. 383, 390-94 (1913)), but extends to "the portions of commercial premises which are not open to the public." *See v. City of Seattle*, 387 U.S. 541, 545 (1966).

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. City of Seattle, supra at 543; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

The immigration authorities themselves recognize that a businessman is entitled to the protections of the Fourth Amendment in areas of commercial premises closed to the public:

> Only under very special circumstances is the search without a search warrant of a . . . business office . . . justifiable and hence not a violation of the Fourth Amendment. . . . This is a most precious right, and the general requirement that a search warrant be obtained is not lightly to be dispensed with.
>
> . . . .
>
> When a Service officer has reason to search . . . the nonpublic areas of a commercial building, he should, in the absence of consent, seek an appropriate search warrant based on probable cause to believe that violators or evidence of the violation of the civil or criminal provisions of the immigration laws are on the premises.

U.S. DEP'T OF JUSTICE, *supra* at 25-26.

It follows that a farmer, whose business is producing agricultural commodities and whose commercial premises include his fields, is entitled to the same standard of protection under the Fourth Amendment that other businessmen enjoy, all else being equal. In other words, if a farmer exhibits an actual and reasonable expectation of privacy as to his fields, then government officials should not be allowed to enter onto or search those fields without valid consent or a warrant, unless the search falls within the narrow category of exceptions to the warrant requirement.

As a rule, farmers do exclude the public from their production areas. Conscious of the potential problems of theft, vandalism, and disruption of their business operations, farmers generally prohibit the public from entering their fields. Where practical, many growers post "no trespassing" signs and erect fences or gates in order to exclude the public from their fields. Growers or their agents order from their lands trespassers who may be discovered thereon, such as in the case at bar.

By taking such measures, farmers in effect "close" their fields. The fact that it is not feasible for farmers to wall off their fields from possible intruders should have no effect upon their expectation of privacy which they otherwise exhibit. One District Court of Appeal in California elaborates on this idea:

> Short of erecting an impenetrable enclosure, we can conceive of no other feasible measures the rural dweller might reasonably undertake to assert and preserve his individual right of privacy. We agree with the Phelan court that no perceptible difference exists "between [wholly] fenced land on the one hand and open land having a particular enclosed area on the other hand, insofar as the Fourth Amendment is concerned." [Citation.] To contemplate a contrary conclusion would itself lend credence to a specter of citadel-like fortifications in order to safeguard an otherwise objectively reasonable expectation of privacy of the contemporary rural dweller, a refuge neither required nor compatible with established constitutional principles.

Burkholder v. Superior Court, 96 Cal.App.3d 421, 429, 158 Cal.Rptr. 86 (1st Dist. Ct. App. Cal. 1979).

As a result of the modification of the *Hester* "open fields" exception to the Fourth Amendment by the *Katz* "reasonable expectation of privacy" doctrine, some courts have recognized that " 'open fields' may, in certain cases, be protected by the Fourth Amendment." *United States v. DeBacker*, 493 F.Supp. 1078, 1079 (W.D. Mich. 1980). At 493 F.Supp. 1081, the *DeBacker* court explains its reasoning for this proposition:

> [A] reading of the Fourth Amendment [that under *Katz*, "open fields" are outside Fourth Amendment protection because no reasonable expectation of privacy exists in such places] would provide police with a carte blanche to investigate areas outside of a homestead's curtilage. . . .
>
> I am convinced that *Katz* compels a more sensitive reading of the Fourth Amendment. [Citation.] Instead of declaring entire areas as outside of Fourth Amendment protection, I believe *Katz* compels an analysis of the particular type of surveillance, and its effect on the privacy and security of citizens. [Citation.] As Justice Harlan discussed in his dissenting opinion in *United States v. White*, 401 U.S. 745, 786, 91 S.Ct. 1122, 1143, 28 L.Ed.2d 453 (1971), Fourth Amendment analysis requires "assessing the nature of the particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." The ultimate question, therefore, is not whether the surveillance in this case occurred in "open fields." Instead, the issue is whether "if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." [Citation.]

The above-quoted language by the *DeBacker* court is especially appropriate when considering the applicability of the "open fields" doctrine to searches where law enforcement officers do not discover the illegal nature of the object of their search until after they have entered the area where the object is located. Many cases dealing with the "open fields" doctrine have involved a search for an object whose illegal nature was discovered by mere observation of the object from a vantage point outside the area in question. For example, aerial surveillance of a field from an aircraft flying at legal altitudes may result in the discovery of plant growth which appears to be marijuana. The illegal nature of the object of such aerial surveillance is apparent from visual observation of the object alone, and such observation would provide probable cause that criminal activity is occurring on the land in question.[3]

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[3]Even in a situation such as that, however, "[t]he fact that the presence of the contraband . . . was discovered by resort to plain view instead of, say, information supplied by a reliable informant, has no bearing upon the question of whether an intrusion into those premises may now be made for the purpose of seizing that contraband. As the Court stated in [*Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)]:

> plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle • • • that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

1 W. LaFave, Search And Seizure: A Treatise On The Fourth Amendment § 2.2(a), at 224 (1978) (footnote omitted). *See Taylor v. United States*, 286 U.S. 1 (1932); *Burkholder v. Superior Court, supra.*

Another example is found in *Air Pollution Variance Board v. Western Alfalfa, supra.* As this Court noted there, the inspector "had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke." Again, the illegal nature of the substance in question (*i.e.*, the smoke) was discovered by mere observation from afar.

Searches where law enforcement officers do not discover illegality until after they have entered the area where the illegal object is located are a different matter. For example, in the typical search for undocumented workers upon agricultural lands, Border Patrol agents locate, either by aerial or ground surveillance, a group of workers. The agents thereupon enter the agricultural fields, approach the workers, and question them as to their legal right to be in the United States. It is as a result of this questioning that the agent determines whether or not there is probable cause to believe that a particular worker is in violation of immigration laws. Similarly, in the case at bar the state police detectives did not discover any illegal activity until after they had entered Petitioner Oliver's farm.

A search where law enforcement officers do not discover illegality until after they have entered the area where the illegal object of their search is located results is a significantly greater intrusion into the privacy and freedom of the individual on whose lands the search occurs than does the discovery of illegality from a vantage point outside the area where the illegal object is located. The very nature of the former type of search, for example, requires Border Patrol agents to enter agricultural lands only when workers are present thereon. Such searches severely disrupt the work being performed by the farmworkers, whether or not

there are undocumented workers present. Many times these searches occur when critical work must be performed as quickly as possible, resulting in substantial production losses due to the disruption of tight production schedules. Unlike the situation in *Air Pollution Variance Board v. Western Alfalfa, supra,* the invasion of privacy resulting from this type of search is not "abstract and theoretical" (*Id.* at 865); rather, it is concrete and real.

Furthermore, growers feel that such entries and searches harass and reduce them to the status of second-class citizens. The first sentence of the American Farm Bureau Federation policy quoted *supra* at page 7 is in reaction to the current state of uneven enforcement of immigration laws. In remarks to the United States Senate made during floor debate, former U.S. Senator S. I. Hayakawa of California noted:

> Immigration Service statistics show us that 8 percent of the illegal aliens employed in the United States are working in agriculture. However, almost 50 percent of the undocumented alien workers apprehended are agricultural workers.

128 CONG. REC. S10,479 (daily ed. Aug. 13, 1982). Growers feel that this disproportionate share of scrutiny is due primarily to the ability of officers under present policy to enter fields at will, whereas a different enforcement policy advises officers, "in the absence of consent, [to] seek an appropriate search warrant" before searching the nonpublic areas of a commercial building. U.S. DEP'T OF JUSTICE, *supra* at 26.

Growers feel that they are being subjected to a double standard and undue harassment as a result of the dis-

crepancy between the law enforcement search policies regarding commercial agricultural operations and other types of commercial operations. Such feelings result in contempt for the law and a sense of frustration.

Moreover, growers have reported numerous instances of property damage caused by hasty and careless Border Patrol entries onto their fields. Such damage may include the destruction of crops, crop supportive structures, fences, gates, and unpaved avenues. Even more frightening are reports of situations where growers, workers, or their children have been injured or have narrowly escaped injury during this type of search operation.

Before invading the privacy of an individual and causing such disruption and damage, law enforcement officers, including Border Patrol agents, should have probable cause to believe that specific criminal activity is occurring upon private agricultural lands they intend to search and, in the absence of valid consent or exigent circumstances, should be required to procure from a neutral magistrate a particularized warrant based on such probable cause.

IV

THE POLICY OF LAW ENFORCEMENT OFFICIALS WHICH REGARDS AGRICULTURAL LANDS PER SE AS UNPROTECTED BY THE FOURTH AMENDMENT IS CONTRARY TO PROPER FOURTH AMENDMENT ANALYSIS

This Court has noted that the Fourth Amendment generally requires that a warrant be obtained, and the burden of showing an exemption (*e.g.*, exigent circumstances or pervasively regulated business) from this requirement is on the government. *Chimel v. California*, 395 U.S. 752, 762

(1969); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *McDonald v. United States*, 335 U.S. 451, 456 (1948). "Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Marshall v. Barlow's, Inc.*, *supra* at 312.

The practice of law enforcement officials which regards agricultural lands *per se* as beyond the scope of Fourth Amendment protections is contrary to the above-noted presumption and burden of proof. The warrant requirement is the rule, not the exception. A policy which circumvents that rule opens the door to a host of potential situations of agent misconduct or mistake. Such misconduct could include searches motivated by bribery or by personal reasons such as an officer's personal dislike of or quarrel with a grower. For example, such mistakes occur when Border Patrol agents apprehend citizens or documented workers who may not be carrying documentation on their persons at the time of apprehension.

In order to minimize such instances of misconduct or mistake law enforcement officers should be required to follow the same procedures under the Fourth Amendment when they wish to search an agricultural field closed to the public that they must follow when they wish to search any other type of commercial premises not open to the public.

CONCLUSION

In the case at bar, the United States Court of Appeals for the Sixth Circuit, sitting *en banc,* incorrectly held that any expectation of privacy in an "open field" is *per se* unreasonable. The holding undercuts this Court's holding in *Katz v. United States, supra,* that "the Fourth Amendment protects people, not places." Unless this Court reverses the Sixth Circuit court's holding and acknowledges that growers are entitled to the same standard of protection under the Fourth Amendment that other businessmen enjoy, law enforcement officials will continue to apply a double standard regarding searches of commercial agricultural operations and commercial operations of other types.

WHEREFORE, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation respectfully pray that this Court reverse the judgment below.

Respectfully submitted,

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NO. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RAY OLIVER, Petitioner

v.

UNITED STATES, Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA (ACLU-NC), MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), AND CALIFORNIA RURAL LEGAL ASSISTANCE (CRLA) IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1/]

The American Civil Liberties Union of Northern California (ACLU-NC) is an affiliate of the American Civil Liberties Union which this Court has recognized as a "national non-partisan organization defending our Bill of Rights for all without distinction or compromise." In re Primus, 436 U.S. 412, 414 n.2 (1978). The national ACLU and its affiliates "engage in extensive educational and lobbying activities" and "devote much of their funds and energies to an extensive program" of "litigation that has defined the scope of

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1/ Letters from counsel for both parties consenting to the filing of a brief amicus curiae on behalf of these three organizations are on file with the Clerk of this Court.

constitutional protection in areas such as . . . privacy." Id. at 427-28. The Mexican American Legal Defense and Educational Fund (MALDEF) is a non-profit, non-partisan organization dedicated to the advancement, primarily through education and litigation, of the rights and opportunities of Americans of Mexican heritage. California Rural Legal Assistance (CRLA) is a legal services program providing representation in civil matters to indigents in rural California.

The ACLU-NC, MALDEF, and CRLA have in the past and are currently representing a number of employees and the commercial enterprises, including agricultural businesses, for which they work in litigation concerning entries and searches of commercial premises and

detention and questioning of employees by agents of the Immigration and Naturalization Service and other government agencies. The scope of the "open fields" doctrine is central to determination of the limits upon governmental intrusion in these contexts. The decision in this case will therefore directly affect both the rights of the litigants involved and the litigative, legislative, administrative, and educational efforts of these three organizations to protect and enhance rights of privacy, personal security, and freedom from unreasonable searches and seizures.

SUMMARY OF ARGUMENT

From Hester v. United States, 265 U.S. 57 (1924) through Marshall v. Barlow's Inc., 436 U.S. 307 (1978), this Court has consistently interpreted the "open fields" doctrine to permit a warrantless entry by government agents upon commercial private property only if the owner has not exhibited an intent to retain privacy and has generally permitted the public at large to encroach upon that portion of the premises. The dictum in Olmstead v. United States, 277 U.S. 438 (1928), suggesting that privacy rights are limited to particular locations, such as the "curtilage," has long since been rejected by this Court. Nevertheless, it has misled some lower courts, such as the majority below, into a rigid

locational application of the "open fields" doctrine, which is inconsistent with this Court's Fourth Amendment jurisprudence.

The common law property right to exclude others creates a legitimate expectation of privacy protected by the Fourth Amendment. The right to exclude is particularly important in the commercial setting because it permits operation of the business free from unwarranted disruption. In order to assert their privacy interests, property owners need only take customary precautions reasonably calculated to alert the public. A pragmatic approach to the precautions required to assure privacy is particularly important in the commercial context because more impregnable barriers would interfere

with the effective operation of a commercial enterprise, including free movement of its employees.

Broad-scale, arbitrary intrusions upon commercial enterprises, such as INS farm and ranch operations, not only infringe upon the Fourth Amendment rights of commercial owners but also threaten the personal security and privacy interests of their employees. This Court has vigorously protected the individual right to personal security in public places. The Fourth Amendment interests of people in "open fields," recognized by the court below, can only be effectively protected if random large-scale entries are prohibited.

I. THE "OPEN FIELDS" DOCTRINE FIRST ARTICULATED IN HESTER V. UNITED STATES IS CONSISTENT WITH SUBSEQUENT FOURTH AMENDMENT JURISPRUDENCE PROTECTING EXPECTATIONS OF PRIVACY THAT SOCIETY RECOGNIZES AS LEGITIMATE.

This Court has repeatedly been called upon to clarify the relationship between the interests protected by the Fourth Amendment and the rights attendant upon ownership of private property. From Hester v. United States, 265 U.S. 57 (1924), through Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), this Court has consistently explained that the property right to exclude normally creates a legitimate expectation of privacy protected by the Constitution, see, e.g., Rakas v. Illinois, 439 U.S. 128, 144 n. 12 (1978), although a technical trespass by the government will not violate the Fourth Amendment where the

right to exclude has not been regularly asserted against the general public. See, e.g., Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974). In addition, legitimate Fourth Amendment interests can also exist in the public domain where no one can assert private property rights. See, e.g., Reid v. Georgia, 448 U.S. 438 (1980) (public airport); Katz v. United States, 389 U.S. 347 (1967) (public telephone booth). This case requires the Court once more to clarify this interaction between property and Fourth Amendment rights because of a misconception by the court below, engendered by the use of a rigid locational approach in Olmstead v. United States, 277 U.S. 438 (1928), as to the Fourth Amendment interests that may be asserted by property owners in

land stretching beyond the perimeters of residential use.

We start from common ground. As Justice Rehnquist wrote for the Court in Rakas, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." 439 U.S. at 144 n. 12. But even property owners ordinarily must "have exhibited an actual (subjective) expectation of privacy," Katz, 389 U.S. at 361 (Harlan, J., concurring), if they wish to retain constitutional protection against unwanted police intrusion upon their property. "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not

'protected' because no intention to keep them to himself has been exhibited." Id.

Hester is entirely consistent with this analysis. There, federal agents, who had prior information about Hester's involvement in the moonshine liquor trade, trespassed upon a portion of Hester's father's private property, 50 to 100 yards from his home, from which the public was not generally excluded. From that position they saw Hester come out of the house and hand a quart bottle to Henderson. When an alarm was given, the two men fled and dropped bottles later determined to contain bootleg whiskey. Hester's claim of a Fourth Amendment violation based upon the warrantless trespass upon his father's land was rejected by the Court

with this summary statement:

> The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle . . . This evidence was not obtained by the entry into the house . . . [T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields.
>
> 265 U.S. at 58-59.[2/]

The Court did not need to consider whether the area was within or without the "curtilage" because, to use

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2/ The Hester opinion continued: "The distinction between the latter [the open fields] and the house is as old as the common law," citing Blackstone. Id. at 59. Blackstone, however, discusses only whether entry of certain areas of a private residence constitutes the common law crime of burglary, noting that all buildings and land "within the curtilage" are covered. 4 W. Blackstone, Commentaries 225 (1791). He did not claim that the distinction has any relevance to the common law property right to exclude. See pp.26-27 infra.

Justice Harlan's terms, Hester had exposed his bottles and liquor transactions to the view of outsiders, had not exhibited any intention to keep them to himself or to keep strangers from his father's land, and thus had forfeited his constitutional protection against unwanted police intrusion. As Justice Black explained, Hester stands for the proposition that "what a person knowingly exposes to the public is not a subject of Fourth Amendment protection." Coolidge v. New Hampshire, 403 U.S. 443, 509 n. 6 (1971) (Black, J., concurring and dissenting).

The same analysis was used in Western Alfalfa where Justice Douglas, writing for a unanimous Court, invoked Hester in rejecting a commercial enterprise's Fourth Amendment objection to a

warrantless trespass. The state inspector there entered the outdoor premises of a business establishment, without consent, to conduct a pollution test on smoke emitted from the plant. The Court's reasoning confirms the congruence of Hester, Katz and Rakas:

> The field inspector did not enter the plant or offices . . . nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky--plumes of smoke. The Court in Hester v. United States . . . speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded . . . [H]e is well within the "open fields" exception to the Fourth Amendment approved in Hester.
>
> 416 U.S. at 864-65 (emphasis added).

Marshall v. Barlow's Inc. confirmed this view and clarified that the scope of Fourth Amendment protection of commercial property is not diminished because employees are on the premises. The Court held that a warrant was required before a government health and safety inspector could examine areas open only to employees, explaining:

> The Government inspector, however, is not an employee. Without a warrant, he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the government inspector as well. The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.
>
> Id. at 315

Indeed, as the Court explained in Barlow's, a major impetus to enactment of the Fourth Amendment was the reaction

to general warrants "acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." Id. at 311. Protection of commercial premises from open-ended and unjustified governmental intrusion is thus not only consistent with this Court's holdings but compelled by the history and purpose of the Amendment itself.

In sum, the "open fields" doctrine permits the government to enter upon private property, commercial or otherwise, and to utilize the information derived from its observations there, only if the owner has not exhibited her intent to retain privacy and has generally permitted the public at large to encroach

upon that particular part of the premises. 3/ For this reason, the Court was

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3/ The "open fields" doctrine is derived from the same conceptual framework as the "consent" and "plain view" doctrines. The "consent" doctrine recognizes that an individual with a legitimate expectation of privacy may voluntarily forfeit it in a specific instance to the police, even though she has not generally waived constitutional protection by permitting the public at large to enter the same premises. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See infra note 4 . The "plain view" doctrine, like the "open fields" doctrine, permits the police to utilize any information inadvertently gathered from observations made while lawfully admitted to a location. But as the Court explained in Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971), "plain view" only comes into play if the police "had a prior justification for an intrusion," such as a warrant or"hot pursuit." Significantly, Coolidge cites Hester as an example of the police coming across evidence while in "hot pursuit" of a fleeing suspect, id. at 465, and does not even mention "open fields" as a justification for initial police intrusion upon property. Id. at 465-66. See also id. at 515 (White, J. concurring and dissenting) (also citing Hester as involving "plain-sight seizures . . . arising in the course of a hot-pursuit search for a felon").

careful in Hester to limit the concept to "open fields" not "fields" in general.

The only decision in this Court perceived as inconsistent with this understanding--Olmstead v. United States, 277 U.S. 438 (1928)--did not in fact involve an "open fields" question and in any case rests upon a Fourth Amendment analysis long since discarded by the Court. In Olmstead, federal officers intercepted conversations on petitioners' phones without trespassing upon any of their property, simply by placing taps on telephone lines on the street and in the basement of a large office building. Id. at 457. The majority there, relying upon the now outdated view that only physical "entry" upon private property was prohibited,

found no Fourth Amendment violation and stated in dictum that only "an actual physical invasion of [the] house 'or curtilage'" would constitute a "search" in the constitutional sense. Id. at 466. No issue as to the scope of the "curtilage" was involved in Olmstead, however. Yet its approach has often been relied upon since as establishing that a police trespass upon an area outside the "curtilage" does not require a warrant. See, e.g., United States v. Diaz-Segovia, 457 F. Supp. 260, 270 (D. Md. 1978) ("The rule of law . . . is that agents are allowed to trespass upon individual's [sic] property as long as they do not search the house or curtilage").

In Katz, however, the Court explained that "the reach of [the Fourth]

Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure" and that "the underpinnings of Olmstead . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353. Thus the error in Olmstead rejected in Katz was not, as the majority below claims, 686 F.2d at 359, that the Court failed to recognize that electronic intrusions did not exist in 1791. Rather, the error in Olmstead was the limiting of Fourth Amendment protection to specified locations, such as the curtilage, regardless of the severity of the governmental intrusion.4/

4/ In dissent in Olmstead, Justice Brandeis explained that Hester stood only for the proposition that there

The rigid locational application of the "open fields" concept derived from Olmstead is wholly inconsistent with the approach in Katz. For example, in Conrad v. State, 63 Wis. 2d 616, 218 N.W. 2d 252 (1974), the Wisconsin Supreme Court admitted that the sheriff had "committed an outrageous trespass" id. at 624, 218 N.W. 2d at 256, by bringing a large mechanical backhoe and scraper into Conrad's farm, moving several doghouses adjacent to his home, digging some 15 holes, many of them two or three feed deep, at random between the doghouses near the home and a rock pile some 450 feet away, and then

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4/ (con't) was no search because the evidence was obtained through "voluntary disclosures by the defendant." 277 U.S. at 478 n. 11.

bulldozing the rockpile and digging another hole under it. Nevertheless, the court held that this warrantless search-and-destroy mission did not violate the Fourth Amendment because the rockpile, where a corpse was finally discovered, was beyond what the court understood to be "the curtilage."

Reliance upon this mechanical dwelling-plus-curtilage misconception in the commercial setting threatens to undermine this Court's precise demarcation of personal liberty and privacy interests in the public domain. The Immigration and Naturalization Service (INS) expressly relies upon this misunderstanding to justify its random farm and ranch checks for undocumented workers. In responding to a recent Congressional inquiry about the legal

basis for "immigration officers to search open agricultural fields for illegal aliens," INS Commissioner Alan Nelson stated:

> [I]t is well-settled law that the Fourth Amendment does not bar entry onto so-called "open fields" by a law enforcement officer in the performance of his official duties. The term "open fields" has been interpreted to include private lands but not including dwellings or the immediately surrounding area. See Hester v. U.S., 265 U.S. 57 (1924)).
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> 128 Cong. Rec. S10248-49 (daily ed. Aug. 11, 1982) (letter from Commissioner Nelson to Senator Simpson, dated August 10, 1982).

The unrestricted entries excused by this approach not only infringe upon the Fourth Amendment rights of farmowners but also threaten to undermine the constitutional rights of personal security and privacy guaranteed to farmworkers. Surely workers retain at least as much constitutional protection on a farm or ranch or in a factory as they do on the

street or in a car. Brown v. Texas, 443 U.S. 47 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

The decision below, the INS position, and scattered decisions such as Conrad illustrate the havoc that the discarded locational analysis derived from the Olmstead dictum can continue to wreak on this Court's considered Fourth Amendment jurisprudence. Once this misunderstanding is dispelled, the Court can address the question posed here and properly resolved in Western Alfalfa and Barlow's: whether a property owner can legitimately assert an expectation of privacy in property that is used for commercial purposes.[5/]

5/ Because of the large acreage involved and the distance from Oliver's home, it is apparent that the marijuana

II. THE FOURTH AMENDMENT PROTECTS A COMMERCIAL PROPERTY OWNER'S ASSERTION, THROUGH NORMAL PRECAUTIONS, OF THE COMMON LAW RIGHT TO EXCLUDE OTHERS TO PREVENT INTERFERENCE WITH THE COMMERCIAL ENTERPRISE.

Although this Court has rejected the premise that only property interests limit the power of the government to search and seize, see, e.g., Katz, 389 U.S. at 353, it continues to rely on useful concepts drawn from the common law of property in determining whether a person has a legitimate expectation of privacy with respect to a particular place. See, e.g., Rakas, 439 U.S. at 144 n. 12 ("the Court has not altogether abandoned use of property con-

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5/ (con't) crop discovered here was a commercial venture, albeit an illegal one, no different in Fourth Amendment terms from the bootleg operation in Hester, the farm in Conrad, and the industrial plants in Western Alfalfa and Barlow's.

cepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment"); Marshall v. Barlow's, Inc., 436 U.S. at 312 ("If the government intrudes upon a person's property, the privacy interest suffers"); and Alderman v. United States, 394 U.S. 165 (1969)(a property interest in the premises would require suppression of evidence garnered through electronic surveillance of conversations on the premises, even if the owner was neither present at nor a participant in those conversations). As Justice Powell has observed, "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations

of privacy are reasonable." Rakas, 439 U.S. at 153 (Powell, J., concurring).

The common law has long recognized that one of the essential incidents of property ownership is the right to exclude others. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164, 3176 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of property rights"); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); International News Service v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) ("Property depends upon exclusion by law from interference"); Pound, The Law of Property and Recent Juristic Thought, 25 A.B.A.J. 993, 997 (1939) (observing that the "jus

prohibendi or right of excluding others" is one of the six basic rights incident to ownership of property); and 2 W. Blackstone, Commentaries, ch. 1 (11th ed. 1791). Indeed, the notion that the right to exclude attends property ownership is so deeply entrenched in our jurisprudence that this Court has been reluctant to subordinate this right to the statutory right to organize employees, see, e.g., NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), or even to the dictates of the First Amendment. See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976), and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

In the commercial setting, the right to exclude is crucial not only to secure the privacy of the owner and the employees, but also to permit efficient

operation of the business. No commercial enterprise can be expected to function smoothly if inquisitive members of the public, or agents of the government, can routinely intrude. The importance of efficient business operation free from unnecessary inteference has been recognized by this Court in other contexts. See, e.g., Republic Aviation v. NLRB, 324 U.S. 793 (1945) (upholding the rights of employees to solicit for a union during non-working time, so long as business efficiency is not compromised), cited with approval in Eastex, Inc. v. NLRB, 437 U.S. 556, 573, n. 22 (1978). Indeed, this Court has held that under the Fourth Amendment: "[t]he businessman . . . has a constitutional right to go about his business free from unreasonable

official entries upon his private commercial property." See v. Seattle, 387 U.S. 541, 543 (1967).

The right of a property owner to exclude others creates a presumptively legitimate expectation of privacy. See Rakas, 439 U.S. at 144 n. 12 ("one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude"). This presumption may properly be defeated only when the property owner has failed to exercise her right to exclude. Compare Western Alfalfa, 416 U.S. at 865 (the Fourth Amendment does not bar field inspector from entering commercial property where he was not "on premises from which the public was excluded") with See v. Seattle, 387 U.S. at 545

("administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled . . . within the framework of a warrant procedure").

Petitioner here unmistakably exercised his right to exclude by taking a farmer's customary precautions: fencing that portion of his property he wished to secure from intruders, placing a locked metal gate across the access road, and posting numerous signs explicitly alerting potential intruders that they were not welcome. United States v. Oliver, 686 F.2d 356, 362 (6th Cir. 1982) (Keith, J., dissenting). Short of surrounding his property with an insurmountable wall, an electrified fence, or a moat filled with alligators, Mr. Oliver could not have demonstrated

more clearly his intent to exercise his right to exclude.

As amicus curiae in Florida v. Brady, No. 81-1636, another case concerning the scope of the "open fields" doctrine in which this Court has granted certiorari, 102 S.Ct. 2266 (1982), the government, respondent here, has argued that only a landowner who "takes substantial measures to exclude the public" may reasonably expect constitutional protection from warrantless governmental intrusion. Brief for the United States as Amicus Curiae in Support of Petitioner at 17, Brady. Rejecting ordinary posting and fencing as inadequate, the government offers only two examples of sufficient precautions -- erecting an "eight-foot fence topped with barbed wire," citing United States

v. FMC Corp., 428 F. Supp. 615 (W.D. N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978), and a high wall assailable only by means of a "special ladder" or other "equipment." Brief for the United States as Amicus Curiae at 17 and 24 n. 15, Brady. Indeed, the government contends that Brady had no legitimate expectation of privacy in his elaborately fenced and posted ranch even though "deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, [and] cut or cross posted fences," State v. Brady, 406 So. 2d 1093, 1094-95 (Fla.), cert. granted, 102 S.Ct. 2266 (1982), to effect their warrantless entry. Brady, this Court is told, lacked a legitimate expectation of privacy because it was not strictly necessary for the surveillance team

"to break the lock on the gate in order to enter the ranch." Brief for the United States as Amicus Curiae at 23-24, Brady. In essence, the government claims that normal precautions are constitutionally inadequate if they prove insufficient to preclude entry by "persons with a strong desire to enter." Id. at 14.

Fortification of private lands has never been a condition of Fourth Amendment protection. The Constitution protects a person's reasonable expectation of privacy; it does not require one to secure it by force. Indeed, to compel a landowner to construct physical barriers sufficient to secure property against invasion by government agents determined to violate a manifest intent to exclude is to shift to the citizen

the onus of performing the very function the Amendment was designed to serve: "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). Surely the protection of the Amendment is not reserved for landowners financially able or willing to insulate themselves from governmental intrusion by fortifying their lands or using violent means threatening life or limb.[6/] As Professor LaFave has cautioned,

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6/ Indeed, both criminal law and tort law have long imposed liability for the use of force to protect against trespass. See, e.g., People v. Ceballos, 12 Cal. 3d 470, 526 P.2d 241, 116 Cal. Rptr. 233 (1974) (unanimously upholding conviction for assault with a deadly weapon where youth attempting to burglarize defendant's garage was wounded by spring gun set by defendant); Simpson v. State, 59 Ala. 1, 14 (1877) ("It is an inflexible principle of the criminal law of this State, and we believe of all the States,

"the occupants of business and commercial premises should not be put to the choice of taking extraordinary methods of sealing off those premises or else submitting to unrestrained police surveillance." 1 W. LaFave, Search and Seizure § 2.4(b) (1978). See also

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6/ (con't) as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling-house, human life cannot be taken, nor grievous bodily harm inflicted"); Katko v. Briney, 183 N.W. 2d 657 (Iowa 1971) (upholding an award of $30,000 to plaintiff injured when spring gun, set by defendant in an uninhabited farm house primarily used for storage, discharged during plaintiff's burglary attempt); R. Perkins and R. Boyce, Criminal Law 1155 (3d ed. 1982) ("the use of force intended or likely to cause death or great bodily injury is never authorized for the defense of property"); and 1 F. Harper and F. James, The Law of Torts 250 (1956) ("It is uniformly held that the possessor of land or goods cannot use force reasonably calculated to cause death or serious bodily harm for the purpose of

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 403 (1974) (Katz holds that the Fourth Amendment protects against invasions of "the right to maintain privacy without giving up too much freedom as the cost

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6/ (con't) defending his bare dignitary interests in the property").

On the other hand, the law has long recognized "a privilege to use non-deadly mechanical devices (such as barbed wire) to protect property." Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & Econ. 201, 204 (1971). See also Quigley v. Clough, 173 Mass. 429, 53 N.E. 884 (1899) (per Holmes, J., for a unanimous court) (holding that an owner who erected a barbed wire fence to protect his land from trespass was not liable to a person injured while attempting to cross the land without the owner's permission; observing that the use of barbed wire fencing "simply shows an intent to make it more difficult to pass the line of the fence"); 1 Restatement (Second) of Torts § 84 (1965); and Bohlen and Burns, The Privilege to Protect Property By Dangerous Barriers and Mechanical Devices, 35 Yale L. J. 525, 528-36 (1926).

of privacy"). Moreover, to hold that a landowner has no legitimate expectation of privacy if reasonable precautions prove insufficient to keep overzealous government agents off the land is tantamount to holding that one who fails to lock the door to her home may not claim the protection of the Fourth Amendment.[7/]

7/ The government, as amicus in Brady, and the Oliver majority below both suggest that there is a lessened expectation of privacy in a field or commercial venture because it is open to aerial surveillance, which they assume is constitutional. See Brief for United States as Amicus Curiae 18 n. 10, Brady, and Oliver, 686 F.2d at 360 n. 4. Aerial surveillance is in no sense an issue in this litigation, as none was attempted here. The Court should properly consider the constitutionality of this practice only in a case where it has actually occurred and the record presents facts relevant to the practice and the nature of the privacy intrusion.

The reasons for avoiding an issue not before the Court are especially strong here, where the issue is complex and the courts divided. Compare People v. Sneed, 32 Cal. App. 3d 535, 108

7/ (con't)
Cal. Rptr. 146 (1973) and Dow Chemical Co. v. United States, 536 F. Supp. 1355 (E.D. Mich. 1982); with United States v. Allen, 675 F.2d 1373 (9th Cir. 1980); Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977); and State v. Layne, 623 S.W. 2d 629 (Tenn. Cr. App. 1981). See generally Annot., 56 ALR Fed. 772 (1982).

Indiscriminate aerial surveillance is a modern version of the freewheeling general searches under the hated colonial writs of assistance, which John Adams viewed as a major cause of the American Revolution. N. Lasson, The History and Development of The Fourth Amendment To The United States Constitution 58-59 (1970). For example, in State v. Layne, supra, the police flew a helicopter over a wide area "searching for stripped cars, moonshine stills, patches of marijuana, and law violations generally." 623 S.W. 2d at 631. John Adams would no doubt be deeply disturbed to learn that the Amendment that was written to prohibit the general searches of his day would prove so frail as to permit this type of wide-ranging, discretionary search for crime.

Nor can aerial surveillance be justified, as suggested in Layne, 623 S.W. 2d at 636, by analogy to the familiar police cruiser on the lookout for criminal acts in "plain view." Police cruisers do not travel through backyards, across farmland, or (except in parts of Florida) through fences and locked

7/ (con't) gates. Though upholding an aerial search, the court in Dean suggests the limitations of the "plain view" rationale.

> Today's sophisticated technology permits overflights by vehicles orbiting at an altitude of several hundred miles. Tomorrow's sophisticated technology will supply optic and photographic devices for minute observations from extended heights. Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance.
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> 35 Cal. App. 3d at 116, 110 Cal. Rptr. at 588 (emphasis added).

These fears were realized in Dow Chemical, where high-altitude aerial photographs revealed details of the interior of a chemical plant, down to half-inch pipes. With such capabilities, and given the relative newness and technological sophistication of aircraft, it whould be obvious that "[p]lane view is not plain view." Granberg, Is Aerial Surveillance Constitutional, 55 Cal. St. Bar J. 451, 454 (1980). Indeed if it were, persons desiring privacy would have to erect opaque domes over their homes or yards.

Finally, even if one were to assume that some forms of aerial surveillance are constitutional, the ground searches challenged here would still be illegal.

7/ (con't)
The government asserts that aerial searches are constitutional, and thus a farmer must have a diminished expectation of privacy with respect to ground searches. Brief of United States as Amicus Curiae 18 n. 10, Brady. This reasoning is exactly backwards. At times, interpretation of the Fourth Amendment has lagged behind the newer technologies of surveillance, compare Olmstead with Katz, and thus newer methods of invading privacy were temporarily not perceived as "searches" or "seizures." See, e.g., Stachler, 58 Haw. at 412, 570 P.2d at 1323 (aerial surveillance "not a search in the constitutional sense"). But the Court has never seen these newer technologies as an excuse for abandoning established safeguards. See Olmstead. The prohibition of warrantless searches on private property has always been at the very core of the Fourth Amendment. The government's approach, however, instead of expanding the Amendment's reach to meet the times, would abandon even the established core of safeguards as no longer suitable in our Brave New World.

Just last Term, this Court resoundingly rejected the argument that the legitimacy of a privacy expectation turns on the impregnability of the object of the search. In United States v. Ross, 102 S. Ct. 2157 (1982), the Court concluded "that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper." Id. at 2171. Noting that such a distinction might be based on the notion that "the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy," the Court stressed that "the propriety of a warrantless search necessarily would turn on much more than the fabric of the container." Id., n. 30. Thus, "[a] paper bag stapled shut and marked 'private' might be

found to manifest a reasonable expectation of privacy." Id. Similarly the propriety of a warrantless search should turn not merely on the height or density of the surrounding fence, but rather on "an objective appraisal of all the surrounding circumstances." Id.[8/]

8/ The presence or absence of fences, gates, and signs manifesting intent to exclude has properly proven determinative in the lower courts of whether a particular warrantless search was justified under the "open fields" rationale, i.e., whether the persons claiming Fourth Amendment protection in an outdoor area failed to assert their legitimate expectations of privacy. Compare, e.g., United States v. Lace, 669 F.2d 46 (2d Cir. 1982) (justified where land not posted and outsiders could enter at will); United States v. Miller, 589 F.2d 1117, 1134 (1st Cir. 1978) (justified where "the appellant made no attempt to secure his open land from unwanted visitors"); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (justified where land beyond fence); and United States v. Balsamo, 468 F. Supp. 1363, 1379 (D. Me. 1979) (justified where "[t]here were no 'No Trespassing' signs or fences restricting access to

In our culture, simple precautions ordinarily suffice to put the public on notice that intrusion is not welcome. As a people who value privacy, we are quick to recognize, and equally quick to respect, the signals by which our fellow citizens announce their desires for

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8/ (con't) the property"); with United States v. Dunn, 674 F. 2d 1093 (5th Cir. 1982) (protected where fenced); United States v. Berkshire Beagle Club, Slip Op. M.B.D. No. 80-24-F (D. Mass. Aug. 5, 1981)(protected where posted and fenced); United States v. FMC Corp., 428 F. Supp. 615 (W.D. N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978) (protected where fenced); United States ex rel. Gedko v. Heer, 406 F. Supp. 609 (W.D. Wis. 1975), vacated and dismissed without opin. sub nom. Gedko v. Cady, 588 F.2d 840 (7th Cir. 1978) (protected where posted and fenced); State v. Brady, 406 So. 2d 1093 (Fla.) cert. granted, 102 S.Ct. 2266 (1982) (No. 81-1636) (protected where posted and fenced); and State v. Byers, 359 So. 2d 84 (La. 1978) (protected where posted and chain across road).

privacy. Thus, one may effectively express a desire to be left undisturbed merely by closing an office door. The unlocked door is hardly impregnable, yet the signal is unmistakable. Similarly, this Court observed in Katz, "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." Katz, 389 U.S. at 352. Although the simple precautions taken by Mr. Katz did not in fact secure the privacy of his conversation, they were constitutionally sufficient. This Court has never required that in order to merit Fourth Amendment protection a person must effectively preclude unwanted

intrusion. Rather, in considering the reasonableness of asserted privacy expectations, this Court has examined whether the person claiming the Amendment's protection "took normal precautions to maintain his privacy." Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (emphasis added). See also, Rakas, 439 U.S. at 152 (Powell, J., concurring) (in considering the reasonableness of asserted expectations of privacy, this Court "has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy -- that is, precautions customarily taken by those seeking privacy").

Such a pragmatic approach to assessing the reasonableness of asserted privacy expectations is particularly

crucial in the commercial context. Efficient operation of a business often requires that the public be excluded from areas immediately adjacent to those in which it is welcome. Still, employees must be able to move freely between these public and private areas. It is customary, for example, for a restauranteur to announce the privacy of her kitchen with a swinging door, which may, but often does not, bear a sign explicitly limiting access to "employees only." A loading dock may remain open much of the working day with only a simple sign limiting access to business suppliers or customers. A farmer with a retail produce stand may surround the adjacent field with a fence and post "No Trespass" signs to demonstrate a desire to limit the

public to the area of the fruit stand. Although none of these customary precautions is invulnerable to violation, all are recognized and respected by the public. As a government agent without a warrant "stands in no better position than a member of the public," Barlow's, 436 U.S. at 315, one who takes such ordinary precautions to secure commercial premises from public interference may reasonably expect freedom from warrantless governmental intrusion as well. We can guarantee the farmer, the lumberman, and the owner of the commercial dock the right to go about their business free from unnecessary interference, See v. Seattle, 387 U.S. at 543, only if we limit governmental intrusion in accordance with the commands of the Fourth Amendment.

III. ARBITRARY WARRANTLESS INTRUSIONS UPON COMMERCIAL ENTERPRISES THREATEN THE PERSONAL SECURITY AND PRIVACY INTERESTS OF EMPLOYEES

Whenever governmental intrusions interfere with business operations, they are also likely to infringe upon the legitimate personal security and privacy interests of employees. It is, for example, the policy of the Immigration and Naturalization Service (INS) to concentrate its "area control operations," which are designed to detect illegal aliens, on businesses employing aliens. Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011, 1014 (N.D. Ill. 1982). During these operations, agents are stationed "at all exits . . . in order to secure the premises and prevent [suspected aliens] from leaving the premises . . . . [T]he

agents do in fact surround and detain all persons on the premises during control operations." Id. at 1018. See also 128 Cong. Rec. S10248 (daily ed., August 11, 1982) (letter of INS Commissioner Nelson to Senator Simpson, dated August 10, 1982). This Court has already recognized that:

> To approve roving patrol stops of all vehicles . . . would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol Officers . . . Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975).

Similarly, here, if the Court were to approve the government's approach to

"open fields," any government agency could subject large numbers of agricultural workers to unlimited interference with their work and random questioning at any time that they were working. Indeed, the majority below candidly admitted that a major benefit of its blanket approach to the "open fields" doctrine is to permit "law enforcement's making random investigations to detect the production of drugs and moonshine." Oliver, 686 F.2d at 360 n. 5. The INS's practice of moving into commercial enterprises in force and detaining all workers and the free-ranging random investigations for criminal activity expressly encouraged by the court below are comparable to the general searches authorized by the hated colonial writs of assistance. These practices preclude

assurance that individual Fourth Amendment rights can be separately and fully protected in the commercial context if this Court approves the unrestricted "open fields" approach of the decision below.

This Court has frequently reaffirmed individual rights to personal security and privacy in public places. See Katz, 389 U.S. at 359 ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures"); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) ("This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs"); Delaware v. Prouse, 440 U.S. 648, 663 (1979)

("[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles"); Brown v. Texas, 443 U.S. 47, 51 (1979) ("A central concern . . . has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field").

The Court has focused primarily on the severity of the intrusion upon individuals' sense of security in public in assessing the constitutionality of INS and Border Patrol practices. For example, in distinguishing permissible checkpoint stops by the Border Patrol

from impermissible random roving-patrol stops, the Court relied primarily on their differing impact on personal security:

> [T]his objective intrusion--the stop itself, the questioning, and the visual inspection--also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less in the case of a checkpoint stop.
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> United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

Similarly, in Prouse, the Court noted that the personal security intrusion effected by a random stop to check documents is no less than that occasioned by a random Border Patrol stop, as both practices entail "an unsettling show of authority" and "may create substantial anxiety." 440 U.S. at 657.

Significantly, the majority below, in the course of rejecting Oliver's Fourth Amendment claim, expressly acknowledged that the situation would be different if the field were occupied by people. It noted that the Fourth Amendment and other laws protecting privacy are important because they "create the conditions and the context for many relationships based on intimacy, friendship and trust . . . and establish an environment in which individual emotional and mental processes can develop freely without surveillance or interference." Oliver, 686 F.2d at 360.[9/] Unfor-

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9/ The privacy concerns of the court below and this Court's vigorous protection of personal security interests in public areas are consistent with social science findings as to the importance of privacy and security in the public domain to individuals' physical

9/ (con't)
and mental health. See, e.g., I. Altman, The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding 50 (1975) ("the ability to regulate contact [with others] . . . is vital to self-definition"); A. Westin, Privacy and Freedom, 39-42 (1967)(for mental stability and personal development, individuals need to control their environments to avoid having "too much" or "too little" privacy); Gavison, Privacy and the Limits of Law, 89 Yale L. J. 421,447 (1980) (privacy "essential" for "learning, writing, and all forms of creativity" as well as for physical relaxation); Laufer and Wolfe, Privacy as a Concept and a Social Issue: A Multidimensional Developmental Theory, 33 J. Soc. Issues, No. 3, at 22, 33-35 (1977) (one important component of personal privacy is "interaction management," control over the circumstances under which an intrusion upon one's privacy occurs); Marshal, Privacy and Environment, 1 Human Ecology 93 (1972) ("ability to control the degree to which people and institutions impinge upon one's life"); Jourard, Some Psychological Aspects of Privacy, 31 Law and Contemp. Probs. 307, 310 (1966) (privacy enables individuals to cope with public pressures and maintain "physical health and. . . psychological and spiritual well-being"); Shils, Privacy: Its Constitution and Vicissitudes, 31 Law & Contemp. Probs. 281, 282-83 (1966) ("voluntary consent" concerning intrusions is an "essential component" of privacy). See other sources

tunately, the court considered Mr. Oliver's efforts at excluding others from his private property in isolation, and ignored the broad-scale intrusions upon the personal security of individuals on property which its reliance upon after-the-fact review portends. The decision below thus fails to protect the very rights of individual security that it deemed most significant, by permitting warrantless governmental intrusions upon all non-residential areas regardless of the likelihood that people will be there.

The personal security in the public domain that this Court's rulings in Katz, Terry, Brignoni-Ponce, Prouse, and Brown protect would be sacrificed if

9/ (con't) cited in Note, Protecting Privacy under the Fourth Amendment, 91 Yale L.J. 313 n. 4, 321 n. 43, 329 n. 83 (1981).

the workplace were suddenly stripped of its longstanding protection from "surveillance or interference," Oliver, 686 F.2d at 360, or the "unsettling show of authority" Prouse, 440 U.S. at 657, by large groups of roving government agents. The "inestimable right of personal security," Terry, 392 U.S. at 8-9, protected when citizens "step from their homes onto the public sidewalks" and "when they step from the sidewalks into their automobiles" Prouse, 440 U.S. at 663, surely does not evaporate because they drive to work.

For the reasons stated, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Dated: March 10, 1983

Respectfully submitted

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ACLU-NC

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*Counsel wishes to express his profound gratitude to Jonathan Hart, Class of 1983, and James Heard, Class of 1984 of the Stanford Law School, whose outstanding assistance in the preparation of this brief demonstrates that they will one day be respected and valuable members of the Bar of this Court.

No. 82-15

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
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THE SIXTH CIRCUIT

**BRIEF AMICI CURIAE OF
AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC.
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC.,
AND THE
LEGAL FOUNDATION OF AMERICA,
IN SUPPORT OF THE RESPONDENT**

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Frank E. Haddad, Jr., Esq., counsel for the Petitioner, and Hon. Rex E. Lee, Solicitor General, United States Department of Justice, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making

the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-one times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. is a professional service organization and is incorporated as a not-for-profit California corporation. The group has nearly 700 members, all of whom are full-time law enforcement pilots or flight support personnel. The association sponsors an annual three-day national training conference, and six regional aircraft safety seminars each year. Its bi-monthly magazine, *Air Beat,* is dedicated to the safe utilization of aircraft for law enforcement purposes.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's interest in the instant case arises from our concern that any retrenchment from the open fields doctrine of *Hester* v. *United States*, 265 U. S. 57 (1924), will unduly hamper the crucial efforts of state and federal law enforcement agencies in their aerial surveillance of illegal marijuana crops grown in rural areas of the country. We ask this Court to affirm the *en banc* holding of the Sixth Circuit Court of Appeals in *United States* v. *Oliver*, 686 F. 2d 356 (6th Cir. 1982), where the court held that the protection of the Fourth Amendment does not extend to open fields and does not require an *ad hoc* consideration of the facts of each case to determine whether the owner of an open field reasonably expects privacy with respect to such field. We believe that the *en banc* court properly ruled that fields of marijuana located about one mile from the petitioner's house by road, and almost that far in a direct line, were not within the curtilage of the petitioner's house, but were "open fields," and not protected by the Fourth Amendment, even though they were not observable while standing on land other than that of the defendant.

ARGUMENT

Americans for Effective Law Enforcement, Inc. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the **International Association of Chiefs of Police, Inc.**, and other national and state law enforcement groups. Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid, rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law, although we fully agree with the legal analysis submitted by the United States in this case. We confine our brief basically to a suggested resolution of certain important policy issues involved in this case as they pertain to the serious problem of narcotic law enforcement.

I.

THIS COURT SHOULD CONTINUE TO DISTINGUISH OPEN FIELDS FROM OTHER KINDS OF RESIDENTIAL AND COMMERCIAL PROPERTY.

The open lands available in this country for the growing of crops are too vast to receive the protected status of privacy. Fences are erected for the primary purpose of keeping livestock in, not to keep people out. "No trespassing" signs are usually erected to discourage hunters, not hikers, or to limit a landowner's civil liability for unsafe conditions. The law relating to open fields has developed with comparatively little controversy, although not always uniformly. This Court, however, has continually stressed the concept of reasonableness: *reasonable* searches under the Fourth Amendment, *reasonable* expectations of privacy, and *reasonable* suspicions in support of temporary detentions. *See, e.g., Terry* v. *Ohio*, 392 U. S. 1 (1968); *United States* v. *Ross*, 456 U. S. 798 (1982).

II.

THIS CASE INVOLVES THE LEGALITY OF A TERRESTRIAL ENTRY ONTO THE DEFENDANT'S FARM BY STATE POLICE OFFICERS. ANY MODIFICATION OF THE OPEN FIELDS DOCTRINE SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE OPERATIONS.

Amici's interest in this case specifically focuses on the aerial surveillance of fields which are used to cultivate large volumes of marijuana. Many states have highly effective aerial detection and abatement programs. For example, the Florida Department of Law Enforcement, during calendar 1982, confiscated approximately 43,000 marijuana plants at 337 sites in 41 of the state's 67 counties. At least 95 percent of those seizures were solely the result of an initial aerial surveillance by fixed-wing aircraft, flying at 1,000 feet or higher above ground level. (These facts are revealed in the letter of Feb. 16, 1983, from Robert Cummings, Bureau Chief, Investigative Support Services Bureau, Florida Department of Law Enforcement, included in the Appendix of this brief.)

The Bureau of Narcotic Enforcement of California's Department of Justice operates two fixed-wing aircraft; the United States Drug Enforcement Agency also operates a fixed-wing airplane in the State of California. Together, the three aircraft log approximately 500 hours per year of flight time at heights of 1,000 to 2,000 feet, for marijuana detection purposes. In addition, several rural sheriff's departments and the forestry service operate fixed-wing and rotary aircraft, which are used intermittently for the detection of cultivated marijuana fields.

Seizures in California during 1982 involved 90,367 plants, a total of 134,107 pounds from 1,152 crops. The Chief of the California Bureau of Narcotic Enforcement has estimated that at least 70 percent of the domestic marijuana seized by a search warrant resulted from aerial observations. (A letter of March 3, 1983, from S. C. Helsley, Bureau of Narcotic Enforcement, California Department of Justice, appears in the Appendix.)

Typically, programs like those in California and Florida engage in routine air patrol over counties where marijuana has been previously cultivated. The plants are readily observable at even 2,000 feet or more altitude. In fact, pilots rarely fly low, in order that their observations will not be detected by the growers, and also to ensure the safety of the law enforcement officers. Once a sighting is made, photographs are usually taken. Later the observing officer will file an affidavit in support of a search warrant, accompanied by the photographs.

Aerial surveillance programs are not aimed at the private, recreational use of marijuana by a farmer, but at large scale, commercial production. A field may have as many as 1,000 plants, with a weight of 2,500 pounds and a wholesale value of $1,500 to $2,000 a pound.

Flight levels are regulated by the Federal Aviation Administration (FAA), United States Department of Transportation (14 C. F. R. Part 91.79). Regulations for fixed-wing general aviation craft establish a minimum height level of 1,000 feet over cities and 500 feet over sparsely populated areas, although one regulation (subpart (d)) provides that helicopters may travel just above ground level, so long as the craft can make a safe landing in an emergency and avoid other hazards. Law enforcement agencies, such as the California Bureau of Narcotic Enforcement and the Florida Department of Law Enforcement, fly fixed-wing aircraft in excess of 1,000 feet and are still able to observe and photograph marijuana-cultivated plots.

Amici submit that every landowner is aware of the fact that many thousands of private aircraft are operated for pleasure, crop dusting, pipeline inspection, traffic control and speed detection, and other purposes, at regulated levels. The actual number of private aircraft registered with the FAA, as of 1981, was 257,536. No landowner, therefore, can *reasonably* expect that aircraft will avoid his property, or that the occupants will not look down upon his fields during overflights.

Amici believe the open fields doctrine of *Hester* v. *United States*, 265 U. S. 57 (1924), should be preserved in the law of search and seizure, but if this Court is inclined to modify or even abolish that rule, it should be made clear that the Court's decision will not affect the legality of aerial surveillances for the purposes described in this brief. A person may have a reasonable expectation that narcotics officers will not trespass on his land, evade gates or jump fences, but that person does not have a reasonable expectation that aircraft will not lawfully fly over his property.*

---

* See Annotation, *"Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure,"* 56 ALR Fed 772 (1982); Granberg, *"Is Warrantless Aerial Surveillance Constitutional?"* 55 Cal. St. Bar J. 451 (Nov. 1980); Kaye, *"Aerial Surveillance: Private Versus Public Expectations,"* 56 Cal. St. Bar J. 258 (June 1981). The use of visual enhancement aids (such as gyro-stabilized binoculars) also have been upheld, see *People* v. *Joubert*, 118 Cal. App. 3d 637, 173 Cal. Rptr. 428 (1981) and cases cited therein. In that regard, this Court's recent and unanimous decision in *United States* v. *Knotts*, No. 81-1802, 51 LW 4232, 32 Cr L 3069 (1983), adds that "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," referring to the so-called "bumper-beeper."

CONCLUSION

Amici respectfully submit that the *en banc* decision of the Sixth Circuit Court of Appeals should be affirmed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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APPENDIX

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Department of Law Enforcement

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GEORGE FIRESTONE, Secretary of State
JIM SMITH, Attorney General
GERALD LEWIS, Comptroller
BILL GUNTER, Treasurer
DOYLE CONNER, Commissioner of Agriculture
RALPH D. TURLINGTON, Commissioner of Education

February 16, 1983

Mr. Wayne Schmidt
Americans for Effective Law Enforcement
501 Grandview Drive, Suite 209
South San Francisco, California 94080

Dear Mr. Schmidt:

In response to your request for information concerning aerial surveillance and statistical data, let me advise you that the Florida Department of Law Enforcement has had an ongoing Domestic Marijuana Program for the last two years. The 1982 program resulted in the eradication of 43,000 plants, from 337 growing sites in 41 counties, and the arrest of 147 persons for cultivation of marijuana.

This program can directly attribute its success to aerial surveillance, which accounts for approximately 95% of all Florida's domestic marijuana confirmations. The Florida Department of Law Enforcement provides training to state and local agencies in aerial spotting from heights of approximately 1,000 feet. This method of aerial detection has proven itself invaluable through additional confirmation of sightings and statistical data which has doubled in two years.

This department views aerial surveillance as the most important and integral part of its detection of domestically grown marijuana. Without this capability the entire program would be hindered to the point of being ineffective.

If you need additional information concerning this program, please do not hesitate to call.

Sincerely,

Robert L. Edwards, Director
Division of Local Law Enforcement Assistance

Robert Cummings, Bureau Chief
Investigative Support Services Bureau

RC/dt

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

P. O. BOX 13337
SACRAMENTO 95813

(916) 739-5445

March 3, 1983

Mr. Wayne W. Schmidt
Executive Director
AELE
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Dear Mr. Schmidt:

In response to our initial telephone conversation and your letter of February 14, we have compiled the following information.

In 1982, Bureau of Narcotic Enforcement pilots flew over 400 hours in light fixed-wing aircraft in California, dedicated to the aerial identification of commercial marijuana crops.

Our pilots fly at altitudes greater than 1,000 feet above ground level (AGL), and typically greater than 2,000 feet AGL. In addition, we also recommend to other agencies which use aircraft to locate marijuana crops, also to stay above 1,000 AGL for the following reasons.

1. This gives us a good margin above the "minimum safe altitudes" required by the Federal Aviation Regulations, Part 91, section 91.79.

2. The nature of our flights require that our aircraft not be detected, to prevent evidence from being destroyed, and for officer safety. At lower altitudes the aircraft noise is easily heard on the ground in the remote areas which we fly.

3. Our aircraft are susceptible to ground fire from suspects at lower altitudes. The higher altitudes we fly at offer a greater margin of safety.

We do not have exact figures on the percentage of sightings which are made by aircraft. However, I estimate that at least 70% of the domestic marijuana crops seized under authority of a search warrant in California during 1982 were from the result of aerial observations.

Seizures in California during 1982 involved 90,367 plants (134,107 pounds), from 1,152 crops. The wholesale price for "sinsemilla" type marijuana in California runs from $1,500 to $2,000.

Hopefully this information will assist you in preparing your Amicus Curiae brief. If I can be of further assistance to you, please call on me again.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

No. 82-15-CFY
Status: GRANTED

Title: Ray E. Oliver, Petitioner
v.
United States

Docketed:
July 2, 1982

Court: United States Court of Appeals
for the Sixth Circuit

Vide:
82-1273

Counsel for petitioner: Haddad Jr., Frank E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 2 1982	G	Petition for writ of certiorari filed.
2	Aug 5 1982		Brief of respondent United States in opposition filed.
3	Aug 11 1982		DISTRIBUTED. September 27, 1982
4	Aug 25 1982	X	Reply brief of petitioner Ray E. Oliver filed.
5	Sep 17 1982	F	Response requested.
6	Oct 20 1982		Supplemental brief of respondent United States filed.
7	Oct 27 1982		DISTRIBUTED. November 12, 1982
8	Nov 15 1982		Reply brief of petitioner Ray E. Oliver filed.
9	Jan 17 1983		REDISTRIBUTED. January 21, 1983
10	Jan 24 1983		Petition GRANTED.
			**********
11	Mar 7 1983		Brief amicus curiae of Cal. Farm Bureau Fed., et al. filed.
12	Mar 9 1983		Joint appendix filed.
13	Mar 9 1983		Brief of petitioner Ray E. Oliver filed.
14	Mar 9 1983		Brief amicus curiae of ACLU of Northern California, et al. filed.
15	Mar 24 1983		Record filed.
16	Mar 24 1983		Certified original record & C.A. proceedings received.
17	Apr 4 1983		Brief amicus curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
18	Apr 2 1983		Brief amicus curiae of State of California filed.
20	Apr 8 1983		Order extending time to file brief of respondent on the merits until May 11, 1983.
21	May 13 1983		Order further extending time to file brief of respondent on the merits until May 20, 1983.
22	May 20 1983		Brief of respondent filed.
23	Jun 4 1983	G	Motion of petitioner in No. 82-1273 for divided argument filed.
25	Jun 10 1983	G	Motion of petitioner in No. 82-15 for divided argument filed.
26	Jun 20 1983		Motion of petitioner in No. 82-15 for divided argument GRANTED.
27	Jun 20 1983		Motion of petitioner in No. 82-1273 for divided argument GRANTED.
28	Aug 4 1983		CIRCULATED.
29	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 9, 1983. This case is consolidated with No. 82-1273. (2nd case) (1 hour)
30	Nov 1 1983	X	Reply brief of petitioner Ray E. Oliver filed.
31	Nov 9 1983		ARGUED.